No. 87-65-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Providence Journal Company and Charles M. Hauser

Docketed:
July 9, 1987

Court: United States Court of Appeals
for the First Circuit

Counsel for petitioner: Curran,William A.

Counsel for respondent: Hindle,Edward F., Cavanagh Jr.,Joseph V., Abrams,Floyd

Entry	Date	Note	Proceedings and Orders
1	Jul 9 1987	G	Petition for writ of certiorari filed.
2	Aug 7 1987		Brief of respondents in opposition filed.
3	Aug 12 1987		DISTRIBUTED. September 28, 1987
4	Oct 5 1987		Petition GRANTED.
			**********
5	Nov 19 1987		Brief amici curiae of Washington Legal Foundation, et al. filed.
6	Nov 19 1987		Brief amicus curiae of United States filed.
7	Nov 19 1987		Joint appendix filed.
21	Nov 19 1987		Brief of petitioner United States filed.
9	Dec 4 1987	D	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
10	Dec 14 1987		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
11	Dec 16 1987	P	Motion of respondents to dismiss the writ of certiorari filed.
17	Dec 21 1987		Brief amici curiae of American Newspaper Publishers Assn., et al. filed.
13	Dec 23 1987		Brief of respondents Providence Journal Company, et al. filed.
14	Dec 23 1987		Lodgings received.
15	Dec 23 1987		Brief amici curiae of ACLU, et al. filed.
16	Dec 24 1987		Brief of petitioner in objection to respondents' motion to dismiss the writ of certiorari filed.
18	Jan 4 1988	G	Motion of the Solicitor General for leave to file a brief as amicus curiae filed.
19	Jan 5 1988	X	Brief of respondents in support of their motion to dismiss the writ of certiorari filed.
22	Jan 8 1988		CIRCULATED.
23	Jan 11 1988		Motion of the Solicitor General for leave to file a brief as amicus curiae GRANTED.
27	Jan 11 1988		SET FOR ARGUMENT Wednesday, January 20, 1988. (4th case). (1 Hour).
24	Jan 12 1988	X	Reply brief of petitioner United States filed.
26	Jan 12 1988		LODGING by petitioner. (Memorandum of Providence Journal in response to order to show cause.)

87-65

No. -

Supreme Court, U.S.
FILED
JUL 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,
PETITIONER,

v.

PROVIDENCE JOURNAL COMPANY AND
CHARLES M. HAUSER,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

QUESTIONS PRESENTED

I. Whether a trial judge has authority to restrain publication while considering an unprecedented conflict between First Amendment and Fourth Amendment rights.

II. Whether a prior restraint order involving an unprecedented question of priority of Fourth Amendment rights of privacy versus First Amendment rights of free press was "transparently invalid."

LIST OF PARTIES

After an order of the United States District Court for the District of Rhode Island was violated, William A. Curran, a private, disinterested attorney, was appointed as a special prosecutor in accordance with Rule 42(b) of the Rules of Criminal Procedure. A special prosecutor was required because the United States Attorney for the District of Rhode Island represented parties to the underlying action and the attorney for the party in the underlying action who was aggrieved by violations of the order declined to appear as prosecutor.

The proceedings below are criminal contempt proceedings instituted by the special prosecutor against respondents Providence Journal Company and Charles M. Hauser, its executive editor. The contempt proceedings below are entitled *In The Matter of Application to Adjudge The Providence Journal Company and its Executive Editor, Charles M. Hauser, In Criminal Contempt.*

Petitioner in these proceedings is the United States of America.

The respondents before this Court are the Providence Journal Company and Charles M. Hauser.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. -

UNITED STATES OF AMERICA,
PETITIONER,

v.

PROVIDENCE JOURNAL COMPANY AND CHARLES M. HAUSER,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered on December 31, 1986 and modified by an en banc order and opinion issued on May 12, 1987, in a proceeding entitled *In the Matter of Application to Adjudge The Providence Journal Company And Its Executive Editor, Charles M. Hauser, In Criminal Contempt.*

Opinions Below

The initial opinion of the Court of Appeals for the First Circuit is reported in the advance sheet at 809 F.2d 63 but was withdrawn from the bound volume pending the motion for rehearing and rehearing en banc. The initial opinion is reprinted in the appendix hereto, p. A-27, *infra*. The en banc addendum to that opinion is reported at __ F.2d __ and is reprinted in the appendix hereto, p. A-47, *infra*.

The opinion of the United States District Court for the District of Rhode Island (Boyle, C.J.) is reported at 630 F.Supp. 993. A later rescript order imposing sentences has not been reported. The District Court's opinion and order are reprinted in the appendix hereto, pp. A-1 and A-23, *infra*.

Jurisdiction

Criminal contempt proceedings were instituted against respondents in the United States District Court for the District of Rhode Island under Rule 42(b) of the Rules of Criminal Procedure. Jurisdiction was based upon 18 U.S.C. §401(3). Respondents were found to be in criminal contempt and sentences were imposed.

On respondents' appeal, the United States Court of Appeals for the First Circuit, through a three judge panel, entered, on December 31, 1986, a judgment and opinion reversing the District Court's order. On May 12, 1987 a petition for rehearing was denied, although the Court of Appeals did issue an en banc addendum and modification of the panel's initial opinion.

The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. §1254(1).

Statutes Involved

Rules of Criminal Procedure, Rule 42. CRIMINAL CONTEMPT

. . .

(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

18 U.S.C. §401. POWER OF COURT.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.

United States Constitution, Amendment I.

RELIGIOUS AND POLITICAL FREEDOM. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment IV.

UNREASONABLE SEARCHES AND SEIZURES. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case

From 1962 to 1965 the Federal Bureau of Investigation (hereinafter FBI) tapped the telephones of Raymond L. S. Patriarca, a reputed organized crime figure. This surveillance was conducted without a warrant in violation of Patriarca's Fourth Amendment rights. The FBI's tape recordings of Patriarca's telephone conversations were destroyed but logs and memoranda were retained. The illegally intercepted conversations involved not only Raymond L. S. Patriarca but also his son, Raymond J. Patriarca.

In the late 1970's, during Raymond L. S. Patriarca's lifetime, respondent Providence Journal Company (hereinafter "Journal"), a Rhode Island newspaper, unsuccessfully sought to obtain from the FBI, under the Freedom of Information Act, 5 U.S.C. §552, the fruits of the illegal government searches and seizures. *See Providence Journal Company* v. *Federal Bureau of Investigation*, 460 F.Supp. 762 and 460 F.Supp. 778 (D. R.I. 1978), 595 F.2d 889 and 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980). In 1985, after Raymond L. S. Patriarca's death, the Journal again asked the FBI to produce the Patriarca materials. The FBI assented to that request and furnished the materials to the Journal, as well as to several other news media.

On November 8, 1985 Raymond J. Patriarca filed a complaint against the FBI, its director, the United States Department of Justice, the Attorney General, the Journal and a

Rhode Island television station, WJAR-TV 10. The complaint sought, among other things, that the Journal be enjoined from publication of the illegally gathered information. Along with the complaint Patriarca filed a motion for a temporary restraining order and/or injunctive relief.

On November 13, 1985 at about 12:30 p.m. a chambers conference was held by Chief Judge Boyle to consider Patriarca's motion. Chief Judge Boyle indicated that he would schedule the matter for a hearing the next morning. Counsel for the media defendants objected to a hearing that soon, since they needed time to prepare and present legal authorities in objection to Patriarca's request. Therefore, rather than a hearing being scheduled for the morning of November 14, 1985, a hearing was scheduled for November 15, 1985. Believing at that time Patriarca was raising a novel issue concerning the priorities of Fourth Amendment rights of privacy and the First Amendment, and wishing to prevent irreparable harm to Patriarca, the trial judge preserved the status quo by entering a temporary restraining order enjoining publication by the Journal and WJAR-TV 10 regarding the illegally obtained materials pending the November 15, 1985 hearing. The restraining order was eventually vacated by Chief Judge Boyle on November 19, 1985.

A decision by the Journal to publish articles subject to the temporary restraining order had to be made by 10:30 p.m. on November 13, 1985 in order to meet the Journal's next cycle of publication. At no time was the court advised of this fact by the Journal; nor was the court informed that the newspaper intended to publish such articles.

No request was made by the Journal to vacate or stay the order. No petition for mandamus was made to the Court of Appeals. No appeal of the temporary restraining order was taken.

On November 14, 1985 the Journal and Charles M. Hauser, its executive editor, in violation of the court's November 13, 1985 order, published articles concerning the materials illegally gathered by the FBI.

The Journal and WJAR-TV 10 were represented by the same attorneys. Nevertheless, WJAR-TV 10 respected the order in that it did not broadcast the Patriarca materials while the order was in effect.

After notice and hearings, the Journal and Hauser were held in contempt and sanctions were levied. The Journal was fined $100,000; an eighteen month jail term was imposed on Hauser, which was suspended, and Hauser was ordered to perform 200 hours of public service.

The Journal and Hauser appealed. On appeal, a panel of the Court of Appeals for the First Circuit reversed the contempt judgment. The panel held that while court orders must normally be obeyed until vacated or modified (P. A-32, *infra*), the temporary restraining order was "transparently invalid" and could therefore be disregarded by the Journal and Hauser. (P. A-44, *infra*). No exact definition of "transparently invalid" was stated. The panel held that the Journal and Hauser were not required to seek judicial review before violating the order. *Id.*

The special prosecutor moved for rehearing with a suggestion that the matter be heard en banc. The court granted the suggestion for en banc consideration but denied rehearing. Rather, the en banc court, Judge Selya dissenting, issued an opinion as an addendum to, and modification of, the panel opinion while allowing the panel's opinion and order thus modified to stand. (P. A-47, *infra*).

The en banc addendum opinion, in what the court described as dictum (P. A-49, *infra*), suggested that publishers subject to prior restraint orders should make a good faith effort to seek emergency relief. (P. A-48, *infra*). Again, respondents had made no effort in any court for relief. In this case, however, the court had no "clear conviction" that emergency relief was available to respondents within the restraints governing the publisher's decision making. (P. A-49, *infra*). Also, the court believed it would be unfair, because of the publisher's failure to follow the procedures announced in the addendum opinion, to subject respondents to the sanctions imposed. *Id.*

The Reasons for Granting the Writ

I. The Decision of the First Circuit Permitting the Invalidity of the Prior Restraint Order To Be a Defense in Criminal Contempt Proceedings for Violation of Such Order Conflicts With Decisions of This Court.

Where courts have jurisdiction, their orders, however erroneous, are to be obeyed until such orders are vacated or modified. *Walker* v. *City of Birmingham*, 388 U.S. 307, 319-21 (1967); *United States* v. *United Mine Workers*, 330 U.S. 258, 290-93 (1947); and *Howat* v. *Kansas*, 258 U.S. 181, 189-90 (1922). People may not bypass orderly judicial review of injunctive orders before disobeying them. *Walker* v. *City of Birmingham*, 388 U.S. at 320. These rules apply even when the injunction prohibits exercise of First Amendment rights. *Id.* This case is important since the First Circuit's ruling conflicts with these fundamental principles.

The First Circuit found an exception to the bedrock rule that court orders, even those later ruled unconstitutional, must be obeyed until amended or vacated. In cases involving federal law, the First Circuit is the only court to so rule.

The First Circuit, citing *Walker*, held that "transparently invalid" orders may be ignored. (P. A-33, *infra*). The First Circuit misread *Walker*. That case recited the rule plainly:

> "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, *must be obeyed* by them *however erroneous the action of the court may be*, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. *It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed* for error by orderly review, either by itself or by a higher

> court, *its orders* based on its decision *are to be respected*, and disobedience of them is contempt of its lawful authority, to be punished." 258 U.S., at 189-90.

388 U.S. at 314 (emphasis added).

There is no exception to this rule based on degrees of invalidity. The First Circuit has held that in certain circumstances individuals rather than courts are permitted to determine what the law is and how they shall govern themselves. That ruling contradicts this Court's recent statement that,

> "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery." *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911).
>
> *Young* v. *United States ex rel. Vuitton et Fils S.A.*, __ U.S. __, 107 S.Ct. 2124, 2131 (1987).

This case raises a significant question regarding authority of federal courts. Trial judges often, as in this case, must interrupt other court business in order to pass on petitions for emergency relief. There is little time available in such circumstances for cool reflection on intriguing questions of law. Orderly government and administration of justice requires respect for court orders—even those which on second thought are later changed. The Court concluded its opinion in *Walker* by pronouncing that, "[N]o man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics or religion." 388 U.S. at 320-21. This petition raises the important question of whether that pronouncement is still good law.

II. The Question Facing the Trial Court Regarding Priorities of Fourth Amendment Rights versus First Amendment Rights Is Unprecedented and the Temporary Restraining Order Issued to Briefly Maintain the Status Quo While Considering It Is Not "Transparently Invalid."

The trial judge was faced at the temporary restraining order conference with several facts. (1) The information regarding Patriarca had been seized by the FBI in violation of his Fourth Amendment rights. (Pp. A-2, A-28, *infra*). (2) If the Journal was allowed to publish, the damage to Patriarca could not be undone. (Pp. A-6, A-8, *infra*). (3) The Court of Appeals for the First Circuit had previously made rulings regarding the very FBI materials in question, including (a) balancing the Journal's right of access and publication of the materials against Patriarca's right of privacy and finding in favor of Patriarca, *Providence Journal Co.* v. *Federal Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979), and (b) holding that the Journal was not entitled to the FBI materials. *Providence Journal Co.* v. *Federal Bureau of Investigation*, 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980). (4) There was no judicial precedent. (Pp. A-15, A-40, *infra*).

The answer to the Fourth Amendment versus First Amendment question was not an easy one to resolve in the short time available. Chief Judge Boyle, just several weeks before the temporary restraining order chambers conference, had attended the First Circuit Judicial Conference in Puerto Rico where one of the lectures dealt with the precise issue of constitutional privacy rights conflicting with the media's First Amendment rights. To illustrate the novelty of the question raised, one need only note that the Journal rejected the court's offer for next day service and requested a continuance in order to gather and present authorities. Logically, where the question presented was difficult, the answer, regardless of what it is, cannot be considered "transparently invalid."

The question raised was not frivolous. Not only did the issue deserve attention at the First Circuit Judicial Conference, but apparently at least one justice of this Court believes it merits consideration. Indeed, while Justice Stevens agreed in *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976), that no Sixth Amendment right to a fair trial case could warrant prior restraint of a newspaper, he specifically left open the question of whether the same absolute First Amendment protection would apply to all intrusions on privacy. 427 U.S. at 617 (Stevens, J., concurring).

Likewise, the Court in *Near* v. *Minnesota*, 283 U.S. 697 (1931), while broadly condemning prior restraints, carefully left open "questions as to the extent of authority to prevent publications in order to protect private rights. . ." 283 U.S. at 716. *Cf. Seattle Times Co.* v. *Rhinehart*, __ U.S. __, 104 S.Ct. 2199, 2207, 2208 (1984) (in order to protect privacy, newspapers may be enjoined from publishing materials obtained through pretrial discovery).

As Mr. Justice Frankfurter explains, "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 441 (1957). Rather, what he favored was a "pragmatic assessment of its operation in particular circumstances." 354 U.S. at 442. Chief Judge Boyle was simply holding matters in the status quo while he invited counsel to help him in an unprecedented legal setting to make a reasoned, "pragmatic assessment" of the facts and law in these "particular circumstances."

Given the First Circuit's previous opinions regarding the Journal access to the materials in question here, the absence of any precedent resolving the Fourth Amendment versus the First Amendment question and the recorded coments of Chief Justice Hughes in *Near*, added to those of Justices Stevens and Frankfurter, the restraining order certainly cannot be considered frivolous or "transparently invalid."

III. The Decision of the First Circuit Permitting the Invalidity of the Prior Restraint Order To Be a Defense in Criminal Contempt Proceedings for Violation of Such Order Conflicts With Decisions of Other Circuits.

The First Circuit's opinion not only conflicts with *Walker*, *United Mine Workers* and *Howat*, but it is also in conflict with *United States* v. *Dickinson*, 465 F.2d 496 (5th Cir. 1972), and *American Federation of Musicians* v. *Stein*, 213 F.2d 679 (6th Cir.), *cert. denied*, 348 U.S. 873 (1954).

In *Dickinson* the district court ordered news reporters not to publish testimony given in a criminal trial; that order was violated by publication and the reporters were held in criminal contempt. On appeal, the Court of Appeals for the Fifth Circuit held that the gag order was "constitutionally unacceptable, and hence illegal." 465 F.2d at 509. Nevertheless, the Fifth Circuit held that a person must obey orders of a court with jurisdiction and that invalidity of the order, even where the invalidity is of constitutional proportions, may not be a defense to contempt charges. *Id.* The Fifth Circuit remanded the case to the district court to determine whether the contempt judgment or the punishment was appropriate in light of the unconstitutionality of the order.

The First Circuit recognized that its opinion is in conflict with *Dickinson*, but predicted that if the Fifth Circuit were now faced with the case, i.e., after *Nebraska Press Association*, a different result might be obtained. (P. A-43, *infra*). Notwithstanding the First Circuit's comments, there are at least three significant aspects of *Dickinson* which make it indistinguishable from the First Circuit's opinion, regardless of the intervention of *Nebraska Press Association*. First, *Dickinson*, essentially predicting *Nebraska Press Association*, held that pure speech rights were violated. 465 F.2d at 509. Second, the *Dickinson* court grounded its ruling squarely on

Walker, an opinion it believed was quite plain. *Id.* Finally, the *Dickinson* court rejected the contemnors' argument, the same argument made by the Journal and Hauser, that the traditional rule that orders must be obeyed until vacated or reversed does not apply to injunctions infringing freedom of the press. 465 F.2d at 511. The First Circuit and the Fifth Circuit are in clear conflict.

In *American Federation of Musicians* v. *Stein*, *supra*, a union was restrained from publication of plaintiff's name in the union's magazine on an "unfair" agents list. A criminal contempt judgment for violation of the order was upheld. The First Circuit is therefore also in conflict with the Sixth Circuit.

Conclusion

For these reasons, it is respectfully submitted that this petition for a writ of certiorari be granted so that the judgment and decision of the United States Court of Appeals for the First Circuit may be reviewed.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CIVIL ACTION No. 85-0707B
MISC. No. 86-003B

RAYMOND J. PATRIARCA,
PLAINTIFF,

v.

FEDERAL BUREAU OF INVESTIGATION,
AND
WILLIAM H. WEBSTER, DIRECTOR,
AND
UNITED STATES DEPARTMENT OF JUSTICE,
AND
EDWIN MEESE, ATTORNEY GENERAL,
AND
THE PROVIDENCE JOURNAL COMPANY.

IN THE MATTER OF APPLICATION TO ADJUDGE THE PROVIDENCE JOURNAL COMPANY AND ITS EXECUTIVE EDITOR, CHARLES M. HAUSER, IN CRIMINAL CONTEMPT

OPINION

BOYLE, FRANCIS J., Chief Judge.

The Defendant Providence Journal Company (hereinafter "the Journal") was directed to show cause why it was not in contempt of a temporary restraining order entered by the Court on November 13, 1985. The order directed that the Journal not publish information collected more than twenty years ago in violation of the Fourth Amendment rights of Plaintiff Raymond J. Patriarca. At issue are three fundamental constitutional principles: (1) freedom of the press; (2) the right

of the people to be secure in their persons, homes, papers and effects under the Fourth Amendment; and (3) the judicial power of the United States. In this instance the controversy is resolved in favor of the people and the United States.

The Journal publishes two daily newspapers and a Sunday paper. Its views enjoy statewide distribution within Rhode Island. It is the only newspaper which does. Its own description of the event which gives rise to this action appeared in a "banner" front page headline of one of its November 14, 1985 publications. The headline stated, "Court, Journal clash over use of tapes." The sub heading proclaimed, "Despite ruling on Patriarca suit newspaper decides to print excerpts from FBI recordings." The first paragraph reads:

> A federal judge yesterday ordered the *Journal Bulletin* not to publish information about reputed mob leader Raymond J. "Junior" Patriarca obtained through illegal FBI surveillance. Citing the Constitution's guarantee of a free press, the newspaper today published an article despite the order."

The sole issue at this time is whether a publication can be ordered deferred to permit a court an opportunity to determine the right to publish. The Journal argues that the judicial power of the United States does not permit a court to determine this right, and that the Fourth Amendment protection of the people's rights to be secure in their persons, homes, papers and effects is overridden by the freedom of the press secured by the First Amendment. The Journal seeks to justify its violation of law by labeling the order a "prior restraint" and "censorship."

Two essential facts are admitted: (1) the information published was obtained by the Government in violation of the Plaintiff's Fourth Amendment rights: (2) the Defendant Journal willfully and deliberately violated the temporary restraining order entered November 13, 1985.

The Court determines (1) that the Journal does not enjoy its claimed unique, superior constitutional status, free of all judicial inquiry; (2) that the people of the United States are entitled a judicial determination of the extent of their Fourth Amendment security; (3) that it has been previously determined that the Journal had no right to the information, a determination of which the Journal had actual knowledge, and (4) that determinations of constitutional rights are vested by the Constitution in the Courts of the United States.

I. The Facts

The initial complaint was filed by Raymond J. Patriarca on Friday, November 8, 1985. On the following Wednesday (November 13), the Court met in Chambers with counsel for all parties to consider only the application of Raymond J. Patriarca for a restraining order. The Court was advised that the Plaintiff was not then seeking any relief on behalf of Raymond L. S. Patriarca, deceased. The Court granted the request for a temporary restraining order and offered to hear counsel in open Court the following morning on whether the restraining order ought to be continued. Counsel for the Defendant Journal advised that it was not prepared to proceed on such short notice, and at the request of the Journal's counsel, a hearing was set for Friday (November 15). The next morning, Thursday the 14th, the article appeared in the Journal. Following the Friday hearing, the Court scheduled a hearing on Plaintiff's motion for a preliminary injunction for the following Tuesday (November 19). On November 19, 1985 the motion for preliminary injunction was denied as to the Journal but granted as to the Federal Bureau of Investigation (hereinafter "the FBI") and the Justice Department.

The restraining order which entered on November 13 restrained the Defendant, Journal from

> distributing, disseminating or otherwise publishing the logs or airtels, or reports thereof, generated as a result of

electronic surveillance conducted at 168 Atwells Avenue, between March of 1962 and July of 1965, as they relate to Raymond J. Patriarca, pending hearing at 10:00 P.M. on Friday, November 15, 1985.

Within hours of the entry of the order, no later than 10:30 P.M. that very day, the Journal determined that it would violate the restraining order. Various reasons were advanced including the reason that the order constituted "censorship" and was a "prior restraint" and that to defer publication even for a day was to invite politicians and gangsters to use the same tactics to prevent publication of unfavorable information.

On its front page, the Journal in all its publications on Thursday, November 14, published a story which reported alleged conversations between Raymond J. Patriarca and his father, Raymond L. S. Patriarca which had been electronically intercepted by the Federal Bureau of Investigation. The report was based on copies of summaries of conversations which had taken place between 1962 and 1965, some twenty years previous. The story written by Robert Kramer reported that the elder Patriarca, according to the FBI's version of the conversation, advised his son, Raymond J. Patriarca, "You only lie to cops and people you don't know," and "he should marry an Italian girl as she will stand by you when you are in trouble, or won't call the police if you rap her in the mouth." The alleged conversations also concerned the son's difficulties in school and with his friends, both male and female. The tapes that contained the actual statements had been long since destroyed and that all that was available to the Journal were the summaries prepared by FBI Agents. The news story was entitled, "The Patriarca Tapes"; in fact, there are no such tapes.

At the foot of the story, was the "Journal's Statement," which professed respect for the judge who had entered the restraining order. The statement read, in part: ". . . in this case

we are convinced that his order would impose a prior restraint in violation of the Constitution. For that reason we have decided to publish in today's Journal Bulletin the first of a series of stories based on the Patriarca tapes."

A motion to cite the Journal in contempt was filed by Raymond J. Patriarca on November 14, 1985, and when he declined to prosecute the motion, and because the Government was already a party, the Court appointed William A. Curran, Esquire, as a special prosecutor as authorized by Rule 42(b) of the Federal Rules of Criminal Procedure. The Journal elected to proceed without a jury and the parties have stipulated to the facts. The parties were heard on an order directing the Journal to show cause why it should not be held in contempt.

II. Providence Journal Co. *v.* F.B.I.

This controversy has a history. Between the years 1962 and 1965, the FBI maintained a "bug" which recorded conversations within the premises located at 168 Atwells Avenue, in the City of Providence. The property was occupied by Raymond L. S. Patriarca, who police officials claimed was the head of Organized Crime in south-east New England. The "bug" was placed without benefit of a warrant of any kind. It was placed in violation of the Fourth Amendment prohibition of unlawful searches and seizures. The information that was obtained through the use of the bug was obtained by the Government in violation of the Fourth Amendment to the United States Constitution.

The Journal sought disclosure of the tapes from the Department of Justice. The initial request, made November 1, 1976, was refused on the basis that the disclosure of investigatory files compiled for law enforcement purposes would be "an unwarranted invasion of privacy" under the provisions of 5 U.S.C. §552(b)(7)(C). The Journal brought suit in this district to compel disclosure of logs and memoranda made by agents from the tapes which by that time had been erased. *Provi-*

dence Journal Co. v. *F.B.I*, 460 F.Supp. 762 (D.R.I. 1978), *rev'd*, 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980). Raymond L. S. Patriarca was permitted to intervene in the action because Mr. Patriarca's interests "may not [have] be[en] adequately represented" by the Government which had bugged his premises in the first instance. The court (Pettine, Ch. J.) noted that Mr. Patriarca has "a colorable claim arising directly under the Fourth Amendment for injunctive relief to protect his right to be free of unreasonable searches and seizures and governmental improprieties with regard to those seizures." 460 F.Supp. at 767.

Two passages from Chief Judge Pettine's opinion, of which the Journal must be charged with actual knowledge, bear statement at this point:

> Because the fourth amendment protects persons against intrusion on private places and conversations, even those carried on in the most public of phone booths, it surely follows that the Fourth Amendment has something to say about the reasonableness of the uses to which the state puts the seized information. Forbidding the state to wiretap a conversation, but providing no remedy when it not only wiretaps but discloses the contents of the conversation to the public would be to recognize a constitutional right without a concomitant remedy. For if an initial intrusion invades privacy, the public disclosure of what is seized destroys it altogether. Moreover, without this penumbral protection for the seized information, the core fourth amendment right to be free of the initial intrusion would be less secure.

460 F.Supp. at 771. Given such language, surely the Journal was aware that some judicial thinking would require there be a remedy for violations of the Fourth Amendment rights of all. The Court further stated:

> However, I must advert to a spectre of abuse of the government's duty to disclose, which this decision calls to mind. Instead of protecting the right to know and facilitating a newspaper's access to governmental information, the improper disclosure of information can be used to threaten political expression and coerce conformity. We need only remember the FBI's surveillance of Martin Luther King and the use of information or misinformation against him, and recall the burglary of Daniel Ellsberg's psychiatrist, which was carried out for the express purpose of obtaining information to leak to the press, and note that the White House authorized the break-in and bugging of the Democratic National Committee and has used its access to various governmental agencies to gain information about those not in favor, to accept immediately the proposition that the executive's disclosure or threatened disclosure of information, improperly obtained or retained, can impair core first amendment rights.

460 F.Supp. at 777. The First Amendment rights referred to are not the rights of a free press but the rights of a free people. Again, the Journal must be charged with knowledge and notice of this caveat because it was emphasized in connection with the effort of the Journal to obtain the same information which is the basis of this action. In this earlier action the district court refused to make available matters relating to Mr. Patriarca's family relationship and details of private lives of his family members who are still living.

Pending appeal, the Government and Mr. Patriarca sought a stay of that part of the district court's order which required disclosure. In its consideration of the application for the stay, the Court of Appeals for the First Circuit pointed out that the District court declined to stay proceedings for more than a brief time because a longer stay would be a "prior restraint" upon the Journal's publication rights. *Providence Journal Co.* v. *F.B.I.*, 595 F.2d 889, 890 (1st Cir. 1979). The Court of Appeals granted the stay on February 20, 1979, and stated at page 890:

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Appellants are not, of course, entitled to a stay pending appeal without showing that their appeals have potential merit. We believe that they have made a sufficient showing on this score. Where, as here, the denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay. *See Washington Metropolitan Area Transit Commission* v. *Holiday Tours*, 182 U.S. App. D.C. 220, 559 F.2d 841 (1977). Our reading of the district court's opinions and of the briefs indicates that there are serious legal questions presented. The district court itself stated,

> "[T[his is a case of initial impression wherein respectable minds might differ and [embodied] a strong public policy. . . ."

Failure to grant a stay will entirely destroy appellants' rights to secure meaningful review. On the other hand, the granting of a stay will be detrimental to the Journal (and to the public's interest in disclosure) only to the extent that it postpones the moment of disclosure —assuming the Journal prevails—by whatever period of time may be required for us to hear and decide the appeals. Weighing this latter hardship against the total and immediate divestiture of appellants' rights to have effective review in this court, we find the balance of hardship to favor the issuance of a stay.

The stay was in effect for more than five months, from February 20, 1979 to July 27, 1979, the time required to hear and determine the controversy. At no time from the beginning of the litigation was the Journal permitted disclosure of Patriarca family information.

The restraining order issued by this Court was not the first time that the Journal had been prevented from publishing

information concerning the Patriarca family illegally obtained. In *Providence Journal Co.* v. *F.B.I.*, 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980), the Court of Appeals held that the disclosure of the information would violate Title III of the Omnibus Crime Control and Safe Street Acts of 1968, 18 U.S.C. §2510, *et seq.*, as a disclosure of unlawfully obtained information. The Court of Appeals was not concerned that the information was collected before the effective date of the Act (Title III) since disclosure which is also forbidden would take place after the effective date of the Act. The court in part stated, "...the invasion of privacy is not over when the interception occurs, but is compounded by disclosure.... Congress has, in the clearest way, thus decided that the privacy interest of a victim of illegal electronic surveillance is too great to permit any disclosure at all." 602 F.2d at 1013.

In order to emphasize the point the court stated further: "Congress had decided that the risk to privacy created by electronic surveillance is too great to permit any disclosure of the fruits of such surveillance.... In fact, this was exactly the kind of 'insidious invasion of privacy' that Congress 'singled out for special scrutiny and safeguards.' (cite omitted) Intrusions before 1968 were no less insidious than intrusions after 1968, and to the extent reasonable, the victims should be protected from disclosure after 1968 in accord with Congress' stated policy." 602 F.2d at 1013-1014.

This determination certainly should have ended the matter, for the clear holding of the Court of Appeals was that the information obtained by means of illegal electronic surveillance from 1962 to 1965 may not be disclosed by the Journal after 1968. It was determined that the disclosure by either the Providence Journal or the Government was forbidden by an Act of Congress. It is also clear that the determination does not rest on a right of privacy based on constitutional or common law, but on a determination of Congress' dealing with the burdens and benefits of electronic surveillance.

Such was not to be however. With the death of Raymond L. S. Patriarca, the Journal revived its efforts which appeared already to have been foreclosed for all time by its loss in the Court of Appeals. This time, the Government had changed its position, and in spite of the fact that the Court of Appeals had already held that Congress had forbidden disclosure of the very information sought, it delivered the information, not only to the Journal, but to a number of other news agencies as well.[1] The Journal received the information in the summer of 1985 and published it on November 14, 1985.

The initial complaint filed in this action was based on the Freedom of Information Act, 5 U.S.C. §552. However, in the motion for temporary restraining order and the memorandum in support, the Plaintiff asserts Fourth Amendment arguments. In the memorandum, Plaintiff specifically cited *Providence Journal Co.* v. *F.B.I.*, 602 F.2d 1010, and argued that disclosure of the information was barred by that opinion as a violation of Title III.

III. The Journal's Contentions

At the time of the application to this Court, this Court, like the Court of Appeals in the earlier proceeding, was concerned that unless the status quo was maintained for a time until the Court could sort out the various contentions, there would be no status to preserve, and publication would make the matter moot. The immediate issue raised by the application for a restraining order was whether publication should be delayed to afford to a court the opportunity to consider and react. The Journal was not then prepared to go to an immediate hearing on the continuance of the restraining order and itself asked for and obtained an additional day to prepare for a hearing. Thus, with significant legal issues raised and the fact that those issues would be essentially moot unless the Court acted to forestall immediate publication, a temporary restraining order was entered.

[1] Willful disclosure is a felony, 18 U.S.C. §2511(1)(c)(d). 18 U.S.C. 2520 provides a civil action for damages. Injunctions are not precluded. *See Spock* v. *United States*, 464 F.Supp. 510 (S.D.N.Y. 1978). Since the Government was also a party to that action, it was on notice of the Court of Appeals' opinion that disclosure after 1968 of information illegally obtained before 1968, is a violation of Title III.

It is that order that was immediately and deliberately ignored and willfully disobeyed. The Journal does not contest a willful and deliberate violation of the order. Indeed, it could not because it made clear that it wished an immediate confrontation wrapped in the protective banner of the First Amendment freedom of the press. Rather, the Journal looks to ex post facto relief as an escape from its obvious contempt. It argues (1) that violation of a restraining order affecting "pure" speech cannot be the basis for criminal contempt if the order is later invalidated; and (2) that the Court "clearly lacked subject matter jurisdiction" and therefore, there can be no contempt.

1. *Subject Matter Jurisdiction*

The argument that the Court lacks jurisdiction of the subject matter proceeds on the theory that the claim to jurisdiction of the Plaintiff here is frivolous. The Journal asserts that the only basis for jurisdiction here asserted are the Freedom of Information Act (FOIA), 5 U.S.C. §552, and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510, *et seq*. The Journal also asserts that there was an ineffective Fourth Amendment claim put forth by the Plaintiff. What the Journal argues is not that the Court lacks subject matter jurisdiction, that is the lawful ability of a court to resolve a controversy, but that the Plaintiff does not state a claim upon which relief may be granted. Thus, the Journal argues that there is no basis for injunctive relief under the Freedom of Information Act, citing *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), and that Title III of the 1968 Crime Control Act does not provide for "injunctive relief barring dis-

closure of information wrongfully intercepted prior to the statute's enactment.[2] *Mirabile dictu*, the Journal cites the District Court opinion which was reversed on this precise issue by the Court of Appeals, "*Providence Journal Company* v. *Federal Bureau of Investigation*, 460 F.Supp. 762, 679 (sic)." The Journal also relies on *Zerilli* v. *Evening News Ass'n.*, 628 F.2d 217 (D.C. Cir. 1980). In *Zerilli*, the District of Columbia Circuit did hold that Title III remedies apply only to interceptions which took place after 1968. This is clearly not the law in this Circuit. The D.C. Court also held that there was no independent Fourth Amendment claim against a publisher of illegally obtained information, declining to extend a *Bivens* type remedy.[3] *See Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Of course, *Bivens* could only apply to government officials. It came to this conclusion on the basis that the Fourth Amendment is concerned only with searches and seizures and that the First Amendment freedom of the press "militates against such a result." However, it is well established that individual criminal defendants may enforce the exclusionary rule and nothing makes the First Amendment superior to the Fourth Amendment.

Of course, the issue is not what is known now regarding the Court's jurisdiction, but what was known at the time that the restraining order entered. Certainly no court is charged with instantaneous knowledge of all applicable precedent. Indeed, there is nothing to suggest that the Journal called to the Court's attention before the publication any authority relevant

[2] In *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), the court suggested that balancing of interests might be desirable in circumstances such as this where the Freedom of Information Act and the Privacy Act are both involved. 441 U.S. at 293 & n.14. Note 14 points out that 5 U.S.C. §552(a) unlike the FOIA bars disclosure. *See* 5 U.S.C. §552(a). Although a minority view, injunctive process to prevent disclosure has been sustained. *Wolman* v. *U.S. Selective Service System*, 501 F.Supp. 310, 311 (D.D.C. 1980).

[3] Each of these conclusions may well be without vitality. *See Zweibon* v. *Mitchell*, 606 F.2d 1172 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912, *reh. denied*, 453 U.S. 928 (1981).

to the jurisdiction issue. It is to be remembered that the purpose of the temporary restraining order was to hold matters in *status quo* pending a brief interlude for research and contemplation. Courts simply cannot function as "drive in" businesses if the quality of the judicial product is to be worthwhile.

This court has subject matter jurisdiction over this controversy. The Plaintiff seeks enforcement of a constitutional right and enforcement of federal statutory rights. The possibility that Plaintiff may not succeed has nothing to do with the right of this Court to determine whether or not he may succeed.

2. *The Validity of the Order and Criminal Contempt*

The second argument which the Journal makes is that it cannot be held in contempt for exercising "pure" speech if the restraining order is later invalidated. This argument is split into two subsidiary arguments: 1) that the circumstances do not satisfy the requirements for a valid prior restraint; and 2) that the First Amendment freedom of the press precludes a finding of criminal contempt.

In addressing the first of these arguments, it is necessary again to briefly review what occurred. The restraining order entered after a conference with all parties in Chambers. The Court offered to hear the matter in open Court on the next day, but the Journal's counsel asked for and received an additional day for preparation. In the meantime, however, and within certainly less than twelve hours, the Journal made a deliberate decision to violate the order. Whatever the explanations of its counsel, the testimony of its Executive Editor and the circumstances admit of but one conclusion, that the Journal violated the order because of a firmly held conviction that under no circumstances did any court have any authority to tell it not to publish. Its view of the First Amendment is clearly that it has an irrevocable license to publish whatever it pleases whenever it wishes to do so. Although its statement professed

respect for the Judge, its words and actions were those of utter defiance of the constitutional system of justice. It is a system of justice that requires respect. The Journal set itself above the law. In its self-proclaimed "clash" with the Court, it was immediately determined to proclaim itself the victor. Now it argues that the Order was invalid in any event, and hence, it says, a nullity.

The Journal has been seeking to publish the information for many years. It had been denied the information because disclosure would violate Title III. *Providence Journal Co.* v. *F.B.I.*, 602 F.2d 1010. The United States Supreme Court had declined to intervene, denying certiorari at 444 U.S. 1071 (1980). This decision is not only precedent which this Court is required to follow, it is *res judicata* as to the parties to this action. *Montana* v. *United States*, 440 U.S. 147, 153 (1979). In fact, based on the opinion in *Providence Journal Co.* v. *F.B.I.*, 602 F.2d 1010, disclosure of the information is a felony. 18 U.S.C. §2511.

The parties have stipulated that the Journal received the information lawfully. The parties may not stipulate the law, and since this stipulation purports to do so, it is rejected. *Young* v. *United States*, 315 U.S. 257, 259 (1942); *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, 152 (1942); Annot., 92 A.L.R. 663, 664 (1934). It is for the court to determine the law, and, in this instance, the lawfulness of the disclosure is more than seriously in question. As has been pointed out previously, the circumstances suggest a willful disclosure of illegally obtained information, an action forbidden by 18 U.S.C. §2511.

Standing alone, the foregoing circumstances argue strongly for the opportunity for further reflection. The circumstances, however, do not stand alone. Throughout this controversy the Court has not been given, nor has it received, a satisfactory explanation of the basis on which this information was disclosed. This court was concerned with the spectre of a rule

which permits the Government to intrude into everyone's most private thoughts and conversations, obtain them illegally and then publish them to a news organization for dissemination for profit to the public. This was not a novel concern. It was expressed by Chief Judge Pettine to this very Defendant in *Providence Journal Co.* v. *F.B.I.*, 460 F.Supp. 762. He, in part, observed: "the improper disclosure of information can be used to threaten political expression and coerce conformity." 460 F.Supp. at 777.

The Fourth Amendment is the only amendment to the Constitution that expressly refers to the "right of the people." It was adopted because of the experience of the colonists with writs of assistance which allowed government agents to continually rummage through their homes seeking evidence of smuggling. Any information obtained by the Government in violation of the Fourth Amendment may not be used in Court. Under the Defendants version of the issue, such information could be used by anyone, except in court. The rule necessarily provokes a visceral judicial reaction that this indeed may not be the rule that applies in a civilized society. The issue is one which has not been considered by the United States Supreme Court, nor has it even been squarely faced by any other Court, except in one instance to be discussed hereafter. The Journal would have the Fourth Amendment confined to the so-called exclusionary rule. Neither by its terms nor by its history is the purport of the amendment so limited. Historically, it was intended to provide security to people from Government intrusion into civil privacy, not solely for the purpose of protecting those people accused of crimes.

Throughout, the Journal has treated the privacy protected by the amendment as if it involved the tort of invasion of privacy. However, the tort action for invasion of privacy had very different progenitors, namely Samuel Warren & Louis Brandeis, who wrote The Right to Privacy, 4 Harv. L. Rev. 193 (1890). The authors base the action upon "the right to be

let alone." The historical antecedents are found in English common law and such cases as *Pope* v. *Curl*, 2 Atk. 342, 26 Eng. Rep. 608 (1741) and *Prince Albert* v. *Strange*, 2 De G. & Sm. 652, 64 Eng. Rep. 293 (1849). There is no historical relationship between the privacy protected by the Fourth Amendment and the tort action for private invasions of privacy. It is clear beyond doubt that the Fourth Amendment was intended to bar government intrusion. The question surely must be — is the amendment so sterile that it provides no real protection? The Supreme Court has rejected a damages action alternative with respect to the exclusionary rule. Would it do less if the issue involved privacy of one not charged with a crime who was to be tried in the court of public opinion?

Since they were adopted simultaneously, it would make sense that all amendments to the Bill of Rights be construed as a coordinate whole and as part of a coordinate scheme. Reading the First Amendment provision of a free press to cancel out Fourth Amendment security can only be based on the numbering of the amendments. Judicial decisions are not made on such shallow reasoning. Certainly, it does not do violence to the constitutional scheme if a free press were required to respect Fourth Amendment personal security. If reasons are required, they are those stated by Judge Pettine in *Providence Journal Co.* v. *F.B.I.*, 460 F.Supp. at 771, 777, that a constitutional right without a remedy is a hollow pronouncement, and, that a contrary view would permit the Government to destroy those whom it perceives as its enemies by disclosing unlawfully obtained information to the free press. Total freedom would thus be granted to the Government and the press and denied the people. It is quite possible that a reasoned judicial consideration might well find such a result totally unacceptable.

There is much information that is denied to a free press. To begin with, it has no right to force any person to provide it with information. "No comment" is not an uncommon re-

response to its inquiries. Judicial denial of information to the press is not a totally rare occurrence. *See Pell* v. *Procunier*, 417 U.S. 817, 834 & n.9 (1974). It is denied national security information which presents a clear and present danger. *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931). Grand Jury proceedings are secret. Fed.R.Crim.P. 6. A newspaper may not use the copyrighted material of others. *Harper & Row* v. *Nation Enterprises*, __ U.S. __, 85 L.Ed.2d 588, 604 (1985). The free press may be prevented from publishing obscene material. *Flynt* v. *Ohio*, 451 U.S. 619, 622 (1981). Title III of the Safe Streets Act of 1968 denies it access to information obtained by illegal electronic surveillance, whether that information was obtained before or after 1968. *Providence Journal Co.* v. *F.B.I.*, 602 F.2d at 1013-14.

The Journal's contention that "pure" speech is *per se* entitled to immediate publication finds no support anywhere. Indeed it has been stated that "prior restraints are not unconstitutional *per se*." *See Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1974) (relating to the theatrical production "Hair").

The real "clash" in this action, the clash between the First and Fourth Amendments, deserves more than a passing glance. It is a real, substantial and indeed vital issue, which does not deserve the cavalier attitude displayed by the Journal. The above analysis demonstrates the absolute need for at least a brief time to consider the merits of this action. The issue is not frivolous.

Should the foregoing be found inadequate to justify a brief respite, there is a further practical consideration. The Court was not informed of the nature of the information itself at the time the restraint issued. This is not to say that the content of the information is itself significant. The Court became aware of the nature of the information only by reading the next day's newspaper. The significance of this observation is that at least a court should be apprised of the information with which it is

dealing. In this instance the Journal managed by its own efforts to avoid this scrutiny, although labelling the order "censorship."

The fact that the Court ultimately vacated the restraining order and denied a preliminary injunction does not establish that the restraining order is invalid. There are significant differences between a preliminary injunction and a restraining order; that is, a restraining order is intended to hold matters in *status quo* and to prevent ongoing events from mooting a controversy, whereas a preliminary injunction is usually heard after issue has been joined and represents a preliminary judgment on the merits of the cause. In fact, given the time for further unhurried reflection and additional time to research the issues involved, the Court is by no means certain that it should have denied a preliminary injunction. Plaintiff has a powerful Fourth Amendment argument and it is only now that the true effect of the prior litigation involving this information is clearly apparent. It might well be that should the occasion arise in the future a very different result would be reached.

The restraining order which issued has not been held invalid. On reflection, it appears to have been appropriate and tailored to the circumstances. The Court was prepared to grant a forthwith consideration of the issues on the record within less than twenty-four hours of the issuance of the Order. This did not happen because the Court granted the request of the Journal to defer for an additional day, the very time required for the Journal to violate the Order.

Whether the restraining order was valid is not dispositive of the contempt issue. Even an invalid restraining order is sufficient basis on which to find contempt of Court. This order was issued to maintain the *status quo* pending determination of the rights of the parties. The authorities are practically unanimous that a restraining order, though legally infirm must be obeyed. If the Court has jurisdiction of the subject matter and the parties, as the Court did in this matter, the fact that the order

later turns out to be erroneous has no bearing on whether or not a contempt has been committed. *United States* v. *Shipp*, 203 U.S. 563, 573 (1906); *United States* v. *United Mine Workers*, 330 U.S. 258, 289-295 (1947); *Anderson* v. *Dean*, 354 F.Supp. 639, 644-45 (N.D. Ga. 1973); 17 Am.Jur.2d *Contempt* § 43; Annot., 12 A.L.R. 2d 1059, 1078, § 6 (1950). The philosophical basis of this rule is simple but sound; a Court ought to have time to determine legal issues presented to it, and has the right in the meantime to preserve the *status quo*.

The Journal suggests that the rule is otherwise where "pure" speech is involved. In *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967), a case which upheld a finding that racial protesters had been in contempt of a court order forbidding their protest, the Supreme Court stated, "We emphatically reject the notion that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford to those who communicate ideas by 'pure' speech." 388 U.S. at 316 (quoting *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965)). In *Cox* v. *Louisiana*, 379 U.S. 559 (1965), *reh. denied*, 380 U.S. 926, which involved picketing near a courthouse, the court had also stated, "We are not concerned here with such a pure form of expression as a newspaper comment or a telegram by a citizen to a public official. We deal in this case not with free speech alone but with expression mixed with particular conduct." 379 U.S. at 564. From this language, the Journal draws considerable solace. It supposes that it is involved in "pure" speech and therefore that it should fare differently than those who not only speak out but who also march. It concludes that its involvement in "pure" speech absolves it of any responsibility to obey a restraining order. It cites no authority for this proposition, nor does it suggest any principle which affords to the press less responsibility for obeying a restraining order than other citizens. The type of speech certainly does not set the

Journal apart from the citizenry who can be punished for violation of a restraining order prohibiting marches to protest racial discrimination, *Walker* v. *City of Birmingham*, *supra*, or the rights of laborers to strike against the Government or others operating coal mines, *United States* v. *United Mine Workers*, *supra*; *Howat* v. *Kansas*, 258 U.S. 181 (1922).

In *United States* v. *Dickinson*, 465 F.2d 496 (5th Cir. 1972), the district court had ordered that news reporters not report the testimony taken in a case because it might affect trial of the underlying criminal case in a state court. Two reporters ignored the ban on publication, were held in contempt and fined $300 each. The Court of Appeals held that the ban on a free press was "constitutionally unacceptable, and hence illegal." 465 F.2d at 509. The court further held that, in spite of the unconstitutional and illegal character of the injunction, a restraining order must be obeyed until set aside subject to three conditions: (1) the court must have subject matter and personal jurisdiction over the action; (2) adequate and effective remedies must be available for orderly review of the challenged ruling, and (3) the order must not require an irretrievable surrender of constitutional guarantees. 465 F.2d at 511. The Court of Appeals remanded the action to the district court to determine whether the judgment of contempt or the punishment was appropriate in light of the constitutional infirmity of the order. The order in *Dickinson*, *supra*, was blatantly invalid. There was nothing good that could be said in its favor. In the circumstances under consideration, serious, important and close issues are involved, which have not previously been squarely faced. This action fits neatly into the three conditions set forth in *United States* v. *Dickinson*, *supra*, and has with it a serious and doubtful issue of constitutional dimension.

In its bench decision on preliminary injunction, the Court relied on two Supreme Court opinions, *Cox Broadcasting Company* v. *Cohen*, 420 U.S. 469 (1975) and *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978), which involved efforts to prevent dissemination of news, both based upon state statutes. After additional consideration, the Court finds the issue here quite different in at least two ways: (1) a court has already finally ruled that the Journal was not entitled to have the information, and (2) this controversy appears to pit one constitutional principle against another in a battle not previously fought, each having sound reason for a claim of superiority in the circumstances. This action is also quite different from the issues considered in cases involving clashes between the First Amendment right to a free press and the Sixth Amendment right to a fair trial. A Court can by a variety of actions insulate a jury and leave the press free to peddle its information. This is not true with respect to privacy interests which require that the information be denied the public in order to be effective as a right. Thus, it is understandable that in *Wood* v. *Goodson*, 485 S.W.2d 213 (Ark. 1972), the court held that an order which prevented a newspaper from publishing a jury verdict in a criminal case was wholly void and that violation of such an order cannot constitute contempt.

It is true that the preservation of a free press is an essential bulwark to a democratic society. Freedom of the press stands high in the list of fundamental and vital rights. When weighted with the right of the public to be free from unreasonable intrusion, the scales would appear to be at least evenly balanced, and hence require that each have at least equal weight.

IV. Summation: The Court's Right To Determine Controversies

The judicial power of the United States is vested in the courts by Article III of the Constitution. The courts have the right to determine controversies between litigants. *Muskrat* v. *United States*, 219 U.S. 346, 361 (1911); *General Investment*

Co. v. *New York Central R. Co.*, 271 U.S. 228, 230 (1926). The court has, as an ancillary power, the authority to punish for contempt. *Michaelson* v. *United States*, 266 U.S. 42, 65-66 (1924).

In this instance the Journal seized the judicial power to itself. This is a serious controversy involving prior court determinations and conflicts between constitutional principles. Although the order might ultimately be held to be invalid, there is enough substance to it to expect law-abiding persons to respect it at least briefly. The Journal showed no respect whatsoever, and, therefore, it must be found in contempt of the order entered November 13, 1985.

In *Walker* v. *City of Birmingham*, 388 U.S. 307, 320-21 (1967), the court stated:

> [N]o man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion.... [R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

The First Amendment is not the only law to be obeyed. All other provisions of the Constitution must be served, including the Fourth Amendment right of the people to be secure in their homes, papers and effects, and the constitutional right and duty of the court to determine the law under Article III.

The Court will hear the parties at 10:00 A.M., on the 27th day of March, 1986, for the purpose of imposing a penalty upon the Journal and its Executive Editor.

The Special Prosecutor will present a form of Judgment in conformity with this Opinion.

So Ordered.

(s) Francis J. Boyle
Francis J. Boyle, Chief Judge.

March 18, 1986.

In the United States District Court
For the District of Rhode Island

Civil Action No. 85-0707B
Misc. No. 86-003B

RAYMOND J. PATRIARCA,
PLAINTIFF,

v.

FEDERAL BUREAU OF INVESTIGATION,
AND
WILLIAM H. WEBSTER, DIRECTOR,
AND
UNITED STATES DEPARTMENT OF JUSTICE,
AND
EDWIN MEESE, ATTORNEY GENERAL,
AND
THE PROVIDENCE JOURNAL COMPANY.

IN THE MATTER OF APPLICATION TO ADJUDGE THE PROVIDENCE JOURNAL COMPANY AND ITS EXECUTIVE EDITOR, CHARLES M. HAUSER IN CRIMINAL CONTEMPT

ORDER

The Providence Journal Company and its Executive Editor, Charles M. Hauser have been found guilty of criminal contempt. The parties have been heard with respect to an appropriate penalty.

The offense is serious. The Providence Journal Company has chosen to defy an appropriate Court Order and boldly communicate that defiance to hundreds of thousands of residents of this area. The penalty must be substantial.

There are circumstances which suggest mitigation. Most significant is the damage which the Providence Journal Company has managed to inflict upon itself. It has succeeded in tarnishing its image as a law-abiding institution, perhaps irretrievably. It has managed by its own efforts to seriously impeach its future credibility. This is indeed an unfortunate occurrence because so much depends upon the communication of information and views which are both believable and trustworthy.

Of lesser significance, but entitled to be weighed in the balance, is the fact that although a series of articles concerning the so-called "Patriarca Tapes" have been promised, only one article has been brought to this Court's attention. It appears that upon reflection, a decision was deliberately made not to make a bad situation worse.

The circumstances are quite unlikely to be repeated in the future. The Court is satisfied that the zealous First Amendment bias of the Journal Company is real though in this instance seriously misguided. True freedom requires that each person respect the rights of all others. A violation of any person's freedom diminishes the freedom of all.

In substance, the offense is a mistake in judgment conditioned by a mistaken but sincerely held belief in the righteousness of its action. Defendants actions were wrong and the wrong must be righted as best it can. There is no totally satisfactory remedy. There is no practical way to turn back the clock and to restore things as they once were.

The purposes to be served are stated in *United States* v. *Mine Workers*, 330 U.S. 258, 302-303 (1947):

> Sentences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the court. *Gompers* v. *Bucks Stove & Range Co.*, *supra*, at 441. The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and willfully refuses his obedience, does so at his peril. In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future.

The wrong was repeated more than 200,000 times. The Journal's publication sells at retail for .35¢ per copy. Additionally it receives advertising revenues. A penalty of .50¢ per copy is reasonable, and therefore a fine in the amount of $100,000 to be satisfied within 60 days is imposed against the Providence Journal Company.

Mr. Hauser, according to the evidence, was a principal actor. Others were involved but are not now before the Court. Although a jail term is permitted in the circumstances, because of the involvement of others, Mr. Hauser might be perceived as a victim. Furthermore, a jail term would not serve a truly constructive purpose, would result in public expense and would not be beneficial to the public as other alternatives. Mr. Hauser's sentence is suspended and he is placed on probation for a term of 18 months on the usual conditions and is further ordered to perform 200 hours of public service in a program approved by the Probation Office to be carried out within a period of 18 months from the entry of this order. The program will be designed by the Probation Office with a view to employ Mr. Hauser's talents as constructively as possible. The Court specifically suggests that Mr. Hauser's talents might be used in the efforts of the Rhode Island Heritage Commission to publish the Rhode Island Ethnic Pamphlet Series, designed to present and describe the various

unique contributions, customs and folkways of ethnic groups to the State of Rhode Island.

So ORDERED.

(s) FRANCIS J. BOYLE
FRANCIS J. BOYLE, Chief Judge
United States District Court
District of Rhode Island

April 2, 1986.

United States Court of Appeals
For the First Circuit

No. 86-1336

IN THE MATTER OF APPLICATION TO ADJUDGE THE PROVIDENCE JOURNAL COMPANY AND ITS EXECUTIVE EDITOR, CHARLES M. HAUSER, IN CRIMINAL CONTEMPT.

PROVIDENCE JOURNAL COMPANY
AND CHARLES HAUSER,

APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[HON. FRANCIS J. BOYLE, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge*,
WISDOM,* *Senior Circuit Judge*,
and COFFIN, *Circuit Judge*.

Floyd Abrams with whom *Cahill, Gordon & Reindel, Edward F. Hindle, William P. Robinson, III, Jeffrey C. Schreck, Edwards & Angell, Joseph V. Cavanagh, Jr.* and *Blish & Cavanagh* were on brief for appellants.

Ralph G. Elliot, Tyler, Cooper & Alcorn on brief for Hartford Courant and The Concord Monitor, amici curiae.

James C. Goodale, John G. Koeltl, Arthur H. Amron and *Debevoise & Plimpton* on brief for CBS Inc., The New York Times Company and The Washington Post, amici curiae.

William A. Curran with whom *Robert D. Parrillo* and *Hanson, Curran & Parks* were on brief for appellee.

Wendy M. Keats and *John F. Cordes*, Appellate Staff, Civil Division, Department of Justice, *Richard K. Willard*, Assistant Attorney General, and *Lincoln C. Almond*, United States Attorney, on brief for United States, amicus curiae.

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* Of the Fifth Circuit, sitting by designation.

December 31, 1986

WISDOM, Circuit Judge. This appeal presents an apparent conflict between two fundamental legal principles: the hallowed First Amendment principle that the press shall not be subjected to prior restraints; the other, the sine qua non of orderly government, that, until modified or vacated, a court order must be obeyed. The district court adjudged the defendants/appellants, the Providence Journal Company and its executive editor, Charles M. Hauser, (collectively referred to as the "Journal") guilty of criminal contempt. The Journal admits that it violated the order but argues that the order was a prior restraint and that the unconstitutionality of the order is a defense in the contempt proceeding. We agree. A party subject to an order that constitutes a transparently invalid prior restraint on pure speech may challenge the order by violating it.

FACTS

From 1962 to 1965, the Federal Bureau of Investigation conducted electronic surveillance of Raymond L. S. Patriarca, reputedly a prominent figure in organized crime. The FBI conducted this surveillance without a warrant in violation of his Fourth Amendment rights. The FBI later destroyed all tape recordings relating to this surveillance but retained the logs and memoranda compiled from the recordings. In 1976, the Journal requested the logs and memoranda from the FBI under the Freedom of Information Act ("FOIA").[1] The FBI refused this request on the ground that disclosure would be an unwarranted invasion of personal privacy.[2] The Journal then brought suit in the Federal District Court for the District of Rhode Island to compel disclosure.[3] On appeal, we ruled that the FBI was within its discretion when it refused the Journal's request.[4]

[1] 5 U.S.C. §552.

[2] 5 U.S.C. §552(b)(7)(c).

[3] Providence Journal Co. v. F.B.I., 460 F.Supp. 762 (D.R.I. 1978).

[4] Providence Journal Co. v. F.B.I., 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071, 100 S.Ct. 1015, 62 L.Ed.2d 752 (1980).

In the spring of 1985, after the death of Raymond L. S. Patriarca, the Journal renewed its FOIA request to the FBI for the logs and memoranda. The FBI assented to this request and furnished the materials not only to the Journal, but also to WJAR Television Ten and other news media. On November 8, 1985, Raymond J. Patriarca ("Patriarca"), Raymond L. S. Patriarca's son, filed a summons and complaint against the FBI,[5] WJAR, and the Journal.[6] The action was based on the FOIA,[7] Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"),[8] and the Fourth Amendment. The complaint alleged that the FBI had wrongfully released the logs and memoranda to the Journal and WJAR. At the same time Patriarca filed the complaint, he filed a Motion for Temporary Injunctive or Injunctive Relief seeking an order "enjoining the named defendants from disseminating or publishing [the] logs and [memoranda]...."

On November 12, 1985, the summons, complaint, and motion were served on the Journal. One day later, the district court held a conference concerning the request for a temporary restraining order. Counsel for the Journal argued that any restraining order would constitute a prior restraint forbidden by the First Amendment. Over the objections of counsel for the Journal and the government, the court entered a temporary restraining order barring publication of the logs and memoranda by the Journal and WJAR. The district court set a hearing for November 15, 1985, at which time it would decide whether to vacate the order. The district court later vacated the order and denied preliminary injunctive relief against the Journal and WJAR.

[5] Patriarca also named other federal agencies as defendants. Those parties are not relevant for purposes of this appeal.

[6] Several of the illegally intercepted conversations were between Raymond J. Patriarca and Raymond L. S. Patriarca.

[7] 5 U.S.C. §552.

[8] 18 U.S.C. §§ 2510-2520.

On November 14, 1985, the day after the district court issued the order, and while that order was still in effect, the Journal published an article on the deceased Patriarca that included information taken from the logs and memoranda. The son filed a motion to judge the Journal in contempt. When he declined to prosecute the criminal contempt motion, the district court invoked Fed. R. Crim. P. 42(b) and appointed a special prosecutor. Following a hearing, the district court found the Journal guilty of criminal contempt. Subsequent to a sentencing hearing, the court imposed an 18-month jail term on Hauser, which was suspended, ordered Hauser to perform 200 hours of public service, and fined the Journal $100,000. The Journal appealed.

Discussion

This appeal propounds a question that admits of no easy answer. Each party stands on what each regards as an unassailable legal principle. The special prosecutor relies on the bedrock principle that court orders, even those that are later ruled unconstitutional, must be complied with until amended or vacated.[9] This principle is often referred to as the "collateral bar" rule. The Journal relies on the bedrock principle that prior restraints against speech are prohibited by the First Amendment.[10] In this opinion we endeavor to avoid deciding which principle should take precedence by reaching a result consistent with both principles.

Of all the constitutional imperatives protecting a free press under the First Amendment, the most significant is the restriction against prior restraint upon publication. "[T]he chief pur-

[9] *See* Walker v. City of Birmingham, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967); United States v. United Mine Workers, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947).

[10] Nebraska Press Assoc. v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

pose of [the First Amendment's free press] guaranty [is] to prevent previous restraints upon publication."[11] Indeed, "prior restraints upon speech and publication are the most serious and least tolerable infringement on First Amendment rights".[12] Prohibiting the publication of a news story or an editorial is the essence of censorship. The power to censor is the power to regulate the marketplace of ideas, to impoverish both the quantity and quality of debate, and to restrict the free flow of criticism against the government at all levels. It is plain now as it was to the framers of the Constitution and Bill of Rights that the power of censorship is, in the absence of the strictest constraints, too great to be wielded by any individual or group of individuals.

If a publisher is to print a libelous, defamatory, or injurious story, an appropriate remedy, though not always totally effective, lies not in an injunction against that publication but in a damages or criminal action *after* publication.[13] Although the threat of damages or criminal action may chill speech, a prior restraint "freezes" speech before the audience has the opportunity to hear the message.[14] Additionally, a court asked to issue a prior restraint must judge the challenged speech in the abstract.[15] And, as was true in the instant case, a court may issue a prior restraint in the form of a temporary restraining order or preliminary injunction without a full hearing; a judgment for damages or a criminal sanction may be imposed only after a full hearing with all the attendant procedural protections.[16]

[11] *Near*, 283 U.S. at 713.

[12] *Nebraska Press Assoc.*, 427 U.S. at 559.

[13] *Near*, 283 U.S. at 720.

[14] *Nebraska Press Assoc.*, 427 U.S. at 559 ("If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time.")

[15] In re Halkin, 598 F.2d 176, 185 n.17 (D.C. Cir. 1979).

[16] *Id.* at 184 n.15, citing Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. 648, 657-58 (1955).

Equally well-established is the requirement of any civilized government that a party subject to a court order must abide by its terms or face criminal contempt.[17] Even if the order is later declared improper or unconstitutional, it must be followed until vacated or modified. As a general rule, a party may not violate an order and raise the issue of its unconstitutionality collaterally as a defense in the criminal contempt proceeding. Rather, the appropriate method to challenge a court order is to petition to have the order vacated or amended.

In *Walker* v. *City of Birmingham*,[18] the Supreme Court upheld contempt citations against Dr. Martin Luther King, Jr. and other civil rights protestors enjoined from parading without a permit. The protestors argued that the order and the ordinance upon which it was based were unconstitutional because they constituted impermissible prior restraints upon the right to free speech and assembly. The Court noted that the ordinance "unquestionably raise[d] substantial constitutional issues"[19] and that "[t]he breadth and vagueness of the injunction itself would also unquestionably be subject to substantial constitutional question".[20] Nonetheless, the court ruled that the protestors could not raise those constitutional issues collaterally in the contempt proceedings. As the Supreme Court noted in *United States* v. *United Mine Workers*,[21] so long as the court has jurisdiction over the parties and the subject matter of the controversy, an order it issues must be obeyed.[22]

The *Walker* Court found it significant that the contemnors had not sought to appeal the order they violated. The Court declared: "This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims."[23] The *Walker* Court concluded by noting that "no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion".[24]

[17] *Walker*, 388 U.S. 307; *United Mine Workers*, 330 U.S. 258.

[18] 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967).

[19] 388 U.S. at 316.

[20] *Id.* at 317.

[21] 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947).

[22] *Id.* at 293 ("[A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.")

At first glance, *Walker* would appear to control the instant case. There, as here, a party chose to violate an arguably unconstitutional prior restraint rather than to comply with the orderly process of law by seeking relief from an appellate court. *Walker* declares that the contemnors are collaterally barred from challenging the constitutionality of the order forming the basis of the contempt citation. The *Walker* Court was, however, careful to point out that the order issued by the Alabama court was not "transparently invalid". The Court specifically noted that "this is not a case where the injunction was *transparently invalid* or had only a frivolous pretense to validity".[25] The unmistakable import of this language is that a transparently invalid order cannot form the basis for a contempt citation.[26]

Court orders are accorded a special status in American jurisprudence. While one may violate a statute and raise as a defense the statute's unconstitutionality, such is not generally

[23] 388 U.S. at 318.

[24] *Id.* at 320-21.

[25] *Id.* at 315 (emphasis added).

[26] *See* 3 Wright, Federal Practice & Procedure §702 at 815 n.17 (1982) (collateral bar rule does not apply if the order violated was transparently unconstitutional); State ex rel. Superior Court of Snohomish County v. Sperry, 79 Wash.2d 69, 483 P.2d 608 (1971), *cert. denied*, 404 U.S. 939, 92 S.Ct. 272, 30 L.Ed.2d 252 (contempt citation improper because order violated was transparently void); *see also* United States v. Dickinson, 465 F.2d 496, 509-10 (5th Cir. 1972) (recognizing exception to collateral bar rule for transparently invalid orders); Ex parte Purvis, 382 So.2d 512, 514 (Ala. 1980) (same).

the case with a court order.[27] Nonetheless, court orders are not sacrosanct.[28] An order entered by a court clearly without jurisdiction over the contemnors or the subject matter is not protected by the collateral bar rule.[29] Were this not the case, a court could wield power over parties or matters obviously not within its authority—a concept inconsistent with the notion that the judiciary may exercise only those powers entrusted to it by law.

The same principle supports an exception to the collateral bar rule for transparently invalid court orders. Requiring a party subject to such an order to obey or face contempt would give the courts powers far in excess of any authorized by the Constitution or Congress. Recognizing an exception to the collateral bar rule for transparently invalid orders does not violate the principle that "no man can be judge in his own case"[30] anymore than does recognizing such an exception for jurisdictional defects. The key to both exceptions is the notion that although a court order—even an arguably incorrect court order—demands respect, so does the right of the citizen to be free of clearly improper exercises of judicial authority.

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[27] *Compare* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1968) with *Walker*, 388 U.S. 307; *see also Dickinson*, 465 F.2d at 510.

[28] *See* Cobbledick v. United States, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940); *accord* United States v. Ryan, 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971). In *Cobbledick*, the Supreme Court ruled that when a motion to quash a subpoena is denied, the movant may either obey its commands or violate them, and, if cited for contempt, properly contest its validity in the contempt proceeding. *Cf.* Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972); Maness v. Meyers, 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975).

Although these cases are arguably distinguishable from the instant case because they involve orders that require the surrender of irretrievable rights, they nonetheless establish that blind obedience to all court orders is not required. *See also Nebraska Press Assoc.*, 427 U.S. at 559 ("A prior restraint . . . has an immediate and irreversible sanction.")

[29] *United Mine Workers*, 330 U.S. at 293.

[30] *Walker*, 388 U.S. at 320-21.

Although an exception to the collateral bar rule is appropriate for transparently void orders, it is inappropriate for arguably proper orders. This distinction is necessary both to protect the authority of the courts when they address close questions and to create a strong incentive for parties to follow the orderly process of law. No such protection or incentive is needed when the order is transparently invalid because in that instance the court is acting so far in excess of its authority that it has no right to expect compliance and no interest is protected by requiring compliance.

The line between a transparently invalid order and one that is merely invalid is, of course, not always distinct. As a general rule, if the court reviewing the order finds the order to have had any pretence to validity at the time it was issued, the reviewing court should enforce the collateral bar rule. Such a heavy presumption in favor of validity is necessary to protect the rightful power of the courts. Nonetheless, there are instances where an order will be so patently unconstitutional that it will be excepted from the collateral bar rule.[31] We now turn to consider whether the order issued by the district court on November 13, 1985, was, as the Journal contends, transparently invalid.

As noted, the principal purpose of the First Amendment's guaranty is to prevent prior restraints.[32] The Supreme Court has declared: "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."[33] When, as here, the prior restraint impinges upon

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[31] We pause to note that the existence of a transparently unconstitutional order does not indicate an improper motive or incompetence. To the contrary, any number of factors including a short deadline, an excessive workload on the court, or the poor presentation of the issues by the parties can lead the court to issue an order that would not have been issued in the absence of the exigent circumstances.

[32] *Near*, 283 U.S. at 713.

[33] Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971); *see also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

the right of the press to communicate news and involves expression in the form of pure speech—speech not connected with any conduct—the presumption of unconstitutionality is virtually insurmountable.[34]

The distinction between pure speech and speech involving conduct clearly distinguishes the order at issue in *Walker* from the order in the instant case.[35] Immediately after the *Walker* Court stated that the order of the Alabama court was not transparently invalid, it noted:

> We have consistently recognized the strong interest of state and local governments in regulating the use of their streets and other public places. When protest takes the form of mass demonstrations, parades, or picketing on public streets and sidewalks, the free passage of traffic and the prevention of public disorder and violence become important objects of legitimate state concern. As the Court stated in *Cox* v. *Louisiana*, "We emphatically reject the notion...that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as those amendments afford to those who communicate ideas by pure speech."[36]

The clear import of this language is that a different result, or at a minimum a different analysis, would have been required had the *Walker* order restrained pure speech.[37]

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[34] *Nebraska Press Assoc.*, 427 U.S. at 558, 570 (White, J., concurring).

[35] The four dissenters in *Walker* found the ordinance invalid on its face and that the restatement of its provisions by the court in an order was not enough to justify the prior restraint. 388 U.S. 328, 345-46.

[36] *Walker*, 388 U.S. at 315-16 (citations omitted).

[37] *See, e.g.*, Cooper v. Rockford Newspapers, Inc., 50 Ill. App. 3d 250, 8 Ill. Dec. 508, 365 N.E.2d 746, 751 (1977) (distinguishing *Walker* on these grounds).

In its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on pure speech. In *New York Times Co.* v. *United States*,[38] the Pentagon Papers case, the Court held that the New York Times and other newspapers could not be restrained even during wartime from publishing documents that had been classified top secret and obtained without authorization. Notwithstanding that the source who had provided the documents had obtained them possibly as a result of criminal conduct and notwithstanding the government's contention that publication would gravely and irreparably jeopardize national security, the Court refused to uphold the restraint. In his concurring opinion, Justice Stewart stated that a prior restraint upon publication was improper absent proof that publication "will surely result in direct, immediate, and irreparable damage to our Nation or its people".[39]

In its most recent decision on previous restraints on pure speech, *Nebraska Press Association* v. *Stuart*,[40] the Court struck down a gag order issued to ensure the protection of a criminal defendant's Sixth Amendment right to a fair trial. Intending to keep "the barriers to prior restraint...high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it",[41] the Court established a test so difficult to meet that Justice White was led to express his "grave doubt" that any prior restraint in the area would "ever be justifiable".[42] The

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[38] 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971).

[39] *Id.* at 730 (Stewart, J., concurring); *see also id.* at 726-27 (Brennan, J., concurring) ("Thus, only governmental allegations and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.")

[40] 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

[41] *Id.* at 561.

[42] *Id.* at 570 (White, J., concurring); *see also* Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of* Nebraska Press Association v. Stuart, 29 Stan. L. Rev. 497, 497-98 (1977) ("[T]he practical impact of the rule announced [in *Nebraska Press Association* v. *Stuart*] is to outlaw all prior restraints in fair trial/free press cases.").

test requires proof to be established "with the degree of certainty our cases on prior restraint require",[43] that (1) the nature and extent of pretrial publicity would impair the defendant's right to a fair trial; (2) there were no alternative measures which could mitigate the effects of the publicity; and (3) a prior restraint would effectively prevent the harm.[44] It is patently clear that the order of November 13, 1985, fails to pass muster under the *Nebraska Press Association* test.

Patriarca's request for injunctive relief was based on three grounds: the FOIA, Title III, and the Fourth Amendment. A brief review reveals that none of these three could conceivably support the restraint against publication.

In 1979, this Court upheld the FBI's refusal to comply with an FOIA request by the Journal for the Patriarca logs and memoranda.[45] We did not rule that the FBI was forbidden from disclosing those materials; rather, we held that the FBI *could*, in its discretion, turn down the request.[46] Indeed, in *Chrysler Corp.* v. *Brown*,[47] the Supreme Court made clear that the FOIA does not authorize an injunction against disclosure.[48] If the FOIA does not allow a court to prevent a federal agency from disclosing information to the public, it is beyond dispute that it cannot serve as the basis for an order prohibiting a newspaper that has received such information from publishing it. Even if the materials had been given to the Journal improperly or unlawfully, a prior restraint against publication would still be improper.[49]

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[43] 427 U.S. at 569.

[44] *Id.* at 562-68.

[45] *Providence Journal Co.*, 602 F.2d 1010.

[46] *Id.* at 1014-15 ("Our holding is not broad. It gives agencies no sweeping power to withhold information, and does not create a new, general exemption for illegally obtained information.... We decide only that the FBI may properly turn down this FOIA request under Exemption 7(C)") (footnote omitted).

[47] 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979).

[48] *Id.* at 293.

[49] *See New York Times Co.*, 403 U.S. 713.

Similarly, Title III provides no basis for a prior restraint. Title III provides an action for damages to individuals injured as a result of illegal interception or disclosure of private communications.[50] Title III does not, however, provide for injunctive relief, although Congress could have included such a provision.[51] Moreover, the Patriarca electronic surveillance was conducted between 1962 and 1965; Title III was not enacted until 1968. Although we need not decide the issue, we note that the District of Columbia Circuit Court of Appeals has ruled that Title III does not apply retroactively to illegal surveillance conducted before its enactment.[52] Thus, even if injunctive relief were available under Title III, such relief would not necessarily be available in this case.

The final basis for injunctive relief asserted by Patriarca was the Fourth Amendment. A review of the district court's opinion finding the Journal in contempt reveals that the Fourth Amendment issue was utmost on its mind when it entered the November 13, 1985 order. As private parties, however, the Journal and its executive editor cannot violate the Fourth Amendment. The Fourth Amendment protects citizens from abuses by the government,[53] not from actions of private parties.[54] Absent a claim that a newspaper and the FBI were somehow conspiring to violate an individual's rights, the Fourth Amendment simply cannot be the predicate of a prior

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[50] 18 U.S.C. §2520.

[51] Even if Congress had authorized the issuance of a prior restraint under either the FOIA or Title III, a court could issue such an order only if the restraint met the standards articulated by the Supreme Court. Obviously, Congress cannot abrogate by statute the protection accorded the press under the First Amendment.

[52] Zerilli v. Evening News Assoc., 628 F.2d 217, 220-21 (D.C. Cir. 1980).

[53] United States v. Calandra, 414 U.S. 338, 254, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) ("The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects.") (emphasis added); Burdeau v. McDowell, 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed. 1048 (1921).

[54] *Burdeau*, 256 U.S. at 475; *Zerilli*, 628 F.2d at 223-24.

restraint. The Journal obtained the logs and memoranda as a result of a proper FOIA request. Although a Fourth Amendment violation might have occurred when the FBI conducted the surveillance, or possibly when it turned the information over to the media, no Fourth Amendment issues are implicated by the publication of that information by the Journal.[55]

The only interest implicated by the Journal's publication is Patriarca's right to privacy. That publication would prove embarrassing or infringe Patriarca's privacy rights is, however, an insufficient basis for issuing a prior restraint.[56] Rather, Patriarca's sole remedy was a subsequent action for damages,[57] an alternative that he did not pursue.

Although the Supreme Court has never upheld a prior restraint on publication of news,[58] the Court has implied that such a restraint might be appropriate in a very narrow range of cases, when either national security or an individual's right to a fair trial is at stake. An individual's right to protect his privacy from damage by private parties, although meriting great protection, is simply not of the same magnitude. But,

[55] Even if the Journal were subject to the Fourth Amendment, it is doubtful that Patriarca's Fourth Amendment rights could justify a prior restraint. In Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), the Supreme Court declared that a prior restraint is unlawful unless it "fit[s] within one of the narrowly defined exceptions to the prohibition against prior restraints". The special prosecutor has not cited and we have not found any case upholding a prior restraint issued to protect Fourth Amendment rights. *Cf. Nebraska Press Assoc.*, 427 U.S. 539 (possible exception to prohibition against prior restraints for orders protecting a defendant's right to a fair trial); *New York Times Co.*, 403 U.S. 713 (same for orders protecting national security).

[56] *Organization for a Better Austin*, 402 U.S. at 419; Bergelsman, *Injunctions Against Speech and Writing: A Re-Evaluation*, 59 Ky. L.J. 319, 349-50 (1970); *cf.* Konigsberg v. Time, Inc., 288 F.Supp. 989, 989 (S.D.N.Y. 1968).

[57] *See Near*, 283 U.S. at 720.

[58] *Cf. New York Times Co.*, 403 U.S. at 726 n* (Brennan, J., concurring) (Noting that orders prohibiting publication of materials that are obscene or violate copyright provisions are not prior restraints on the freedoms of speech and press protected under the First Amendment).

even assuming that Patriarca's right to privacy, or any other right he could assert, had measured up to the standard necessary for a court to deprive the press of its right to publish, and assuming that Patriarca had sufficiently proved that publication would "surely result in direct, immediate, and irreparable damage"[59] to his rights, the November 13, 1985, order suffered from other infirmities.

As the Supreme Court made clear in *Nebraska Press Association*, a party seeking a prior restraint against the press must show not only that publication will result in damage to a near sacred right, but also that the prior restraint will be effective and that no less extreme measures are available.[60] The district court failed to make a finding as to either of these issues, an omission making the invalidity of the order even more transparent. Indeed, had the court considered the likely efficacy of the order it would have concluded that the order would not necessarily protect Patriarca's rights. Other media, included non-parties to the Patriarca litigation, had the same information that the government had disclosed to the Journal. Moreover, Patriarca's complaint specifically alleged that portions of the information disclosed by the FBI had already been "disseminated" by the media. It is therefore hard to imagine a finding that the prior restraint would accomplish its purpose.

An additional point to note is that the prior restraint was issued prior to a full and fair hearing with all the attendant procedural protections. A prior restraint issued in these circumstances faces an even heavier presumption of invalidity,[61] and the transparent unconstitutionality of the order is made even more patent by the absence of such a hearing.[62]

[59] *Id.* at 730 (Stewart, J., concurring).

[60] 427 U.S. at 562-68.

[61] *See generally* Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va. L. Rev. 53 (1984).

[62] We realize that holding a full hearing on short notice could greatly burden a district court. But, absent circumstances not present in this case, the First Amendment demands nothing less. If the parties agree, the district

The special prosecutor argues, however, that the order was to last only a short period and merely preserve the status quo while allowing the court a full opportunity to assess the issues. We are sympathetic with the district court on this score. This matter came before the district court on an emergency basis. The court was forced to drop its other duties and immediately address this issue. Counsel for the Journal had received the papers less than 24 hours before they presented their arguments to the district court. Based on counsel's hastily prepared authority and without the opportunity for cool reflection, the district court was forced to make a decision. The court's natural instincts was to delay the matter temporarily so that a careful, thoughtful answer could be crafted. This approach is proper in most instances, and indeed to follow any other course of action would often be irresponsible. But, absent the most compelling circumstances, when that approach results in a prior restraint on pure speech by the press it is not allowed.

It must be said, it is misleading in the context of daily newspaper publishing to argue that a temporary restraining order merely preserves the status quo. The status quo of daily newspapers is to publish news promptly that editors decide to publish. A restraining order disturbs the status quo and impinges on the exercise of editorial discretion. News is a constantly changing and dynamic quantity. Today's news will often be tomorrow's history.[63] This is especially true in the case

court can hold the hearing on a less expedited basis. Whether the newspaper could renege on this agreement and demand an immediate hearing is a question we need not address.

The special prosecutor argues that the Journal did agree to abide by the order to allow the district court time to consider the matter when it asked the court to continue for one day the hearing set to determine whether the temporary restraining order should be vacated. No doubt the district court could reasonably assume, based on the request for a day's delay, that a responsible newspaper, represented by respected counsel, would not take advantage of the delay by publishing the Patriarca story before the hearing. It is clear from the record, however, that the Journal did not agree to obey the district court's order.

[63] *Dickinson*, 465 F.2d at 512.

of news concerning an imminent event such as an election. A restraining order lasting only hours can effectively prevent publication of news that will have an impact on that event and on those that the event affects.

Although there is no question that the Patriarca story was not news concerning an imminent event, extraneous factors required its reasonably prompt publication.[64] The Journal had promised its readers that the Patriarca story would be forthcoming. Moreover, other media not subject to the court order had the same logs and memoranda. Were they to disseminate this information while the Journal remained silent, some readers of the Journal might lose confidence in that paper's editorial competence.[65]

As the Supreme Court recognized in *Elrod* v. *Burns*,[66] "[t]he loss of First Amendment Freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury".[67] The heavy presumption of unconstitutionality against a prior restraint "is not reduced by the temporary nature of [the] restraint".[68] In the Pentagon Papers case, Justice Brennan noted in his concurrence that "every restraint in this case,

[64] We need not decide whether our ruling would be different if it were absolutely clear that publication could be delayed without any untoward consequences to the publisher. We point out, however, that even in such a situation, a prior restraint would unquestionably impinge upon first Amendment rights and editorial discretion.

[65] In *United States* v. *Dickinson*, 465 F.2d 496 (5th Cir. 1982), the Court of Appeals for the Fifth Circuit applied the collateral bar rule in a contempt proceeding involving a gag order against a newspaper. We decline to follow Dickinson for two reasons. First, *Dickinson* involved an order issued to protect a defendant's Sixth Amendment right to a fair trial, while the order in the instant matter was issued merely to protect an individual's interest in privacy. Second, *Dickinson* was decided before *Nebraska Press Association*. Were the question presented to the Fifth Circuit now, in the light of the strict test established in *Nebraska Press Association*, a different result might be reached.

[66] 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

[67] *Id.* at 373.

[68] *Nebraska Press Assoc.*, 427 U.S. at 559.

whatever its form, has violated the First Amendment—and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly".[69]

Although the Journal arguably had avenues of appellate relief immediately available to it,[70] we decline to invoke the collateral bar rule because of the Journal's failure to avail itself of these opportunities.[71] When, as here, the court order is a transparently invalid prior restraint on pure speech, the delay and expense of an appeal is unnecessary. Indeed, the delay caused by an appellate review requirement could, in the case of a prior restraint involving news concerning an imminent event, cause the restrained information to lose its value. The absence of such a requirement will not, however, lead to widespread disregard of court orders. Rarely will a party be subject

[69] *New York Times Co.*, 403 U.S. at 727 (Brennan, J., concurring); see also Goldblum v. National Broadcasting Corp., 584 F.2d 904, 906-07 (9th Cir. 1978).

[70] Arguably, the Journal could have immediately appealed the order to this Court under 28 U.S.C. §1292(a)(1). *See* Societe Generale de Surveillance v. Raytheon European Management and Systems Co., 643 F.2d 863, 364 n.2 (1st Cir. 1981). And, although difficult to obtain, the Journal might have sought a writ of mandamus. 28 U.S.C. §1651(a).

[71] If the publisher must appeal, it "faces a dilemma: either violate the order, risking almost certain conviction for contempt, and lose the right to challenge the order's constitutionality, or alternatively, obey the order, seek review, and forfeit, at least temporarily, the very right the would-be speaker seeks to vindicate. The dilemma is particularly acute where First Amendment interests are at stake, for even a temporary restraint on expression may constitute irreparable injury. *Nebraska Press Ass'n*, 427 U.S. at 559, 96 S.Ct. 2791, *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 182, 89 S.Ct. 347 (1968)." *In re Halkin*, 598 F.2d at 184 n.15; *see also Goldblum*, 584 F.2d at 907. ("A broadcaster or publisher should not, in circumstances such as those in this case, be required to make a sudden appearance in court and then to take urgent measures to secure appellate relief, all the while weighing the delicate question of whether or not refusal to comply with an apparently invalid order constitutes a contempt."); Goodale, 29 Stan. L. Rev. at 509 (*Walker* does not require a party subject to a transparently invalid prior restraint to seek appellate review.).

to a transparently invalid court order. Prior restraints on pure speech represent an unusual class of orders because they are presumptively unconstitutional.[72] And even when a party believes it is subject to a transparently invalid order, seeking review in an appellate court is a far safer means of testing the order. For if the party chooses to violate the order and the order turns out not to be transparently invalid, the party must suffer the consequences of a contempt citation.

Conclusion

We conclude that the district court's order of November 13, 1985, was transparently invalid. The order constitutes a presumptively unconstitutional prior restraint on pure speech by the press. The burden necessary to sustain such an order is tremendously heavy[73] and was not met in this case. The only potential danger posed by the restrained speech was to an individual's privacy right. That right can be adequately protected by a subsequent damages action. Moreover, the district court failed to find with certainty that the restraint would accomplish its goal and that no less restrictive alternatives were available. Indeed, it is clear that the court could not have found that the order would necessarily be effective.

Because the order was transparently invalid, the appellants should have been allowed to challenge its constitutionality at the contempt proceedings.[74] A fortiori, the order cannot serve

[72] *Nebraska Press Assoc.*, 427 U.S. at 558.

[73] *Southeastern Promotions Ltd.*, 420 U.S. at 558; *New York Times Co.*, 403 U.S. at 714; *Organization for a Better Austin*, 402 U.S. at 419.

[74] *See State ex rel. Superior Court of Snohomish County*, 79 Wash.2d 69, 483 P.2d 608; Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 418 P.2d 594 (1966); Wood v. Goodson, 253 Ark. 196, 485 S.W.2d 213 (1972); *Cooper*, 50 Ill. App. 3d 250, 8 Ill. Dec. 508, 365 N.E.2d 746 (1977); Barnett, *The Puzzle of Prior Restraint*, 29 Stan. L. Rev. 539, 553-58 (1977); Goodale, 29 Stan. L. Rev. at 509; *see also* Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945).

In *Thomas*, a labor organization was enjoined from soliciting union memberships. The organizer violated the order and subsequently challenged

as the basis for a contempt citation. The order of the district court finding the Providence Journal Company and its executive editor, Charles M. Hauser, in criminal contempt is therefore reversed.[75]

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its constitutionality arguing that the temporary restraining order constituted a prior restraint on pure speech. The Supreme Court allowed this challenge and reversed the contempt citation.

The Journal argues that *Thomas* stands for the proposition that the collateral bar rule does not apply to prior restraints on pure speech. Because the order of November 13, 1985, was transparently invalid, however, we need not address this issue. We note, however, that *Thomas* does provide support for our holding. *Thomas* held that any prior restraint on pure speech was invalid absent clear and present danger of immediate and irreparable injury to the public welfare. Moreover, *Thomas* establishes that the collateral bar rule is not impregnable in cases involving prior restraints on pure speech.

[75] In reversing the contempt citation against the Journal and its executive editor, we in no way condone their conduct. From all appearances, the Journal used the presence of the court order to bolster the importance of the Patriarca story. On November 14, 1985, the day before the scheduled hearing on whether to vacate the Court order of November 13, the Journal's front page headline read: "Court restricts media use of FBI tapes on Patriarca; Journal decides to print". Upon learning of this "battle with the courts", readers would be curious as to what information about Patriarca could be so important that a federal court would prohibit its publication. Not only would more people read the story, but hopefully, those who read the story would respect the Journal's courage in defying the court order and would have a greater appreciation for the Journal's investigative reporting techniques that resulted in the uncovering of the information in the story.

By publishing the Patriarca story the day before the scheduled hearing and by not seeking expedited appellate review of the court's order, the Journal invited a confrontation. We strongly encourage a party subject to a court order to follow the orderly process of law and appeal the order, even if it is transparently invalid, as we have written. But we do not believe that the Journal violated the law when it defied the order of November 13, 1985. Nor do we believe the Journal should have refrained from informing its readers that a court order prohibiting publication had been entered. But it appears to this court that the Journal published the story concerning the court order more for its publicity value than for its news value. Moreover, while professing respect for the judge who entered the order, the Journal chose to make its defiance of that order its headline story.

Misuse of the power of the press cannot be curbed constitutionally by prior restraints in the absence of the most compelling of circumstances, at least where national security is not involved. Although the Journal's actions are not in keeping with its long and distinguished history of responsible journalism they cannot form the basis for a contempt citation.

United States Court of Appeals
For the First Circuit

No. 86-1338

IN THE MATTER OF APPLICATION TO ADJUDGE THE PROVIDENCE JOURNAL COMPANY AND ITS EXECUTIVE DIRECTOR, CHARLES M. HAUSER, IN CRIMINAL CONTEMPT.

PROVIDENCE JOURNAL COMPANY
AND CHARLES HAUSER,
APPELLANTS.

Before
CAMPBELL, *Chief Judge*,
COFFIN, BOWNES, BREYER,
TORRUELLA AND SELYA, *Circuit Judges*.

REHEARING EN BANC
ORDER AND OPINION
ENTERED: MAY 12, 1987

ORDER

We hereby grant petitioner's suggestion for rehearing en banc. We do not, however, vacate the panel's opinion and order dated December 31, 1986. Rather, we issue the attached en banc opinion as an addendum to, and modification of, said panel opinion; and as so modified said panel opinion and order may stand as reflecting the opinion of the en banc court.

Judge Selya does not concur in the above order and attached en banc opinion. Rather he believes the court should hold a hearing and decide the case anew after full briefing and argument.

OPINION

Per Curiam. In reflecting en banc upon the conflicting principles of "collateral bar" and "no prior restraint against pure speech," the court recognizes, with the panel, the difficulties of imposing upon a publisher the requirement of pursuing the normal appeal process. Not only would such entail time and expense, but the right sought to be vindicated could be forfeited or the value of the embargoed information considerably cheapened. Nevertheless, it seems to us that some finer tuning is available to minimize the disharmony between respect for court orders and respect for free speech.

It is not asking much, beyond some additional expense and time, to require a publisher, even when it thinks it is the subject of a transparently unconstitutional order of prior restraint, to make a good faith effort to seek emergency relief from the appellate court. If timely access to the appellate court is not available or if timely decision is not forthcoming, the publisher may then proceed to publish and challenge the constitutionality of the order in the contempt proceedings.[1] In such event whatever added expense and time are involved, such a price does not seem disproportionate to the respect owing court processes; and there is no prolongation of any prior restraint. On the other hand, should the appellate court grant the requested relief, the conflict between principles has been resolved and the expense and time involved have vastly been offset by aborting any contempt proceedings.

We realize that our ruling means that a publisher seeking to challenge an order it deems transparently unconstitutional must concern itself with establishing a record of its good faith

[1] *See* Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of* Nebraska Press Association v. Stuart, 29 Stan. L. Rev. 497, 509-10 (1977) (arguing that *Walker* v. *City of Birmingham*, "may require no more than an attempt to appeal a void restraining order up to the time the constitutionally protected action is planned to take place.").

effort. But that is a price we should pay for the preference of court over party determination of invalidity. In the instant case, assertions have been made that some eight-and-one-half hours elapsed between the issuance of the order by the district court and the deadline for publication. Not only are we left without a clear conviction that timely emergency relief was available within the restraints governing the publisher's decision making, but we would deem it unfair to subject the publisher to the very substantial sanctions imposed by the district court because of its failure to follow the procedure we have just announced. We recognize that our announcement is technically dictum, but are confident that its stature as a deliberate position taken by us in this en banc consideration will serve its purpose.

87-65

No. -

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,
PETITIONER,

v.

PROVIDENCE JOURNAL COMPANY AND CHARLES M. HAUSER,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

QUESTIONS PRESENTED

I. Whether a trial judge has authority to restrain publication while considering an unprecedented conflict between First Amendment and Fourth Amendment rights.

II. Whether a prior restraint order involving an unprecedented question of priority of Fourth Amendment rights of privacy versus First Amendment rights of free press was "transparently invalid."

LIST OF PARTIES

After an order of the United States District Court for the District of Rhode Island was violated, William A. Curran, a private, disinterested attorney, was appointed as a special prosecutor in accordance with Rule 42(b) of the Rules of Criminal Procedure. A special prosecutor was required because the United States Attorney for the District of Rhode Island represented parties to the underlying action and the attorney for the party in the underlying action who was aggrieved by violations of the order declined to appear as prosecutor.

The proceedings below are criminal contempt proceedings instituted by the special prosecutor against respondents Providence Journal Company and Charles M. Hauser, its executive editor. The contempt proceedings below are entitled *In The Matter of Application to Adjudge The Providence Journal Company and its Executive Editor, Charles M. Hauser, In Criminal Contempt.*

Petitioner in these proceedings is the United States of America.

The respondents before this Court are the Providence Journal Company and Charles M. Hauser.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. -

UNITED STATES OF AMERICA,
PETITIONER,

v.

PROVIDENCE JOURNAL COMPANY AND CHARLES M. HAUSER,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered on December 31, 1986 and modified by an en banc order and opinion issued on May 12, 1987, in a proceeding entitled *In the Matter of Application to Adjudge The Providence Journal Company And Its Executive Editor, Charles M. Hauser, In Criminal Contempt*.

Opinions Below

The initial opinion of the Court of Appeals for the First Circuit is reported in the advance sheet at 809 F.2d 63 but was withdrawn from the bound volume pending the motion for rehearing and rehearing en banc. The initial opinion is reprinted in the appendix hereto, p. A-27, *infra*. The en banc addendum to that opinion is reported at __ F.2d __ and is reprinted in the appendix hereto, p. A-47, *infra*.

The opinion of the United States District Court for the District of Rhode Island (Boyle, C.J.) is reported at 630 F.Supp. 993. A later rescript order imposing sentences has not been reported. The District Court's opinion and order are reprinted in the appendix hereto, pp. A-1 and A-23, *infra*.

Jurisdiction

Criminal contempt proceedings were instituted against respondents in the United States District Court for the District of Rhode Island under Rule 42(b) of the Rules of Criminal Procedure. Jurisdiction was based upon 18 U.S.C. §401(3). Respondents were found to be in criminal contempt and sentences were imposed.

On respondents' appeal, the United States Court of Appeals for the First Circuit, through a three judge panel, entered, on December 31, 1986, a judgment and opinion reversing the District Court's order. On May 12, 1987 a petition for rehearing was denied, although the Court of Appeals did issue an en banc addendum and modification of the panel's initial opinion.

The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. §1254(1).

Statutes Involved

Rules of Criminal Procedure, Rule 42. CRIMINAL CONTEMPT

(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

18 U.S.C. §401. POWER OF COURT.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.

United States Constitution, Amendment I.

RELIGIOUS AND POLITICAL FREEDOM. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment IV.

UNREASONABLE SEARCHES AND SEIZURES. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case

From 1962 to 1965 the Federal Bureau of Investigation (hereinafter FBI) tapped the telephones of Raymond L. S. Patriarca, a reputed organized crime figure. This surveillance was conducted without a warrant in violation of Patriarca's Fourth Amendment rights. The FBI's tape recordings of Patriarca's telephone conversations were destroyed but logs and memoranda were retained. The illegally intercepted conversations involved not only Raymond L. S. Patriarca but also his son, Raymond J. Patriarca.

In the late 1970's, during Raymond L. S. Patriarca's lifetime, respondent Providence Journal Company (hereinafter "Journal"), a Rhode Island newspaper, unsuccessfully sought to obtain from the FBI, under the Freedom of Information Act, 5 U.S.C. §552, the fruits of the illegal government searches and seizures. *See Providence Journal Company* v. *Federal Bureau of Investigation*, 460 F.Supp. 762 and 460 F.Supp. 778 (D. R.I. 1978), 595 F.2d 889 and 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980). In 1985, after Raymond L. S. Patriarca's death, the Journal again asked the FBI to produce the Patriarca materials. The FBI assented to that request and furnished the materials to the Journal, as well as to several other news media.

On November 8, 1985 Raymond J. Patriarca filed a complaint against the FBI, its director, the United States Department of Justice, the Attorney General, the Journal and a

Rhode Island television station, WJAR-TV 10. The complaint sought, among other things, that the Journal be enjoined from publication of the illegally gathered information. Along with the complaint Patriarca filed a motion for a temporary restraining order and/or injunctive relief.

On November 13, 1985 at about 12:30 p.m. a chambers conference was held by Chief Judge Boyle to consider Patriarca's motion. Chief Judge Boyle indicated that he would schedule the matter for a hearing the next morning. Counsel for the media defendants objected to a hearing that soon, since they needed time to prepare and present legal authorities in objection to Patriarca's request. Therefore, rather than a hearing being scheduled for the morning of November 14, 1935, a hearing was scheduled for November 15, 1985. Believing at that time Patriarca was raising a novel issue concerning the priorities of Fourth Amendment rights of privacy and the First Amendment, and wishing to prevent irreparable harm to Patriarca, the trial judge preserved the status quo by entering a temporary restraining order enjoining publication by the Journal and WJAR-TV 10 regarding the illegally obtained materials pending the November 15, 1985 hearing. The restraining order was eventually vacated by Chief Judge Boyle on November 19, 1985.

A decision by the Journal to publish articles subject to the temporary restraining order had to be made by 10:30 p.m. on November 13, 1985 in order to meet the Journal's next cycle of publication. At no time was the court advised of this fact by the Journal; nor was the court informed that the newspaper intended to publish such articles.

No request was made by the Journal to vacate or stay the order. No petition for mandamus was made to the Court of Appeals. No appeal of the temporary restraining order was taken.

On November 14, 1985 the Journal and Charles M. Hauser, its executive editor, in violation of the court's November 13, 1985 order, published articles concerning the materials illegally gathered by the FBI.

Moving from arguments directed to the constitutionality of the temporary restraining order — arguments that cannot seriously be entertained — petitioner urges that the Court of Appeals erred in any event in refusing to enforce that order whether or not it was patently unconstitutional. This proposition is plainly incorrect.

The Court of Appeals has explicitly declared that even when an order is transparently invalid, a good-faith effort must be made to obtain judicial review if it is practicable to do so. Since, the court concluded, it could not determine that timely emergency relief was available in this case within the relevant time period — and since the requirement that such efforts be made had not before been clearly established[5] — the court concluded that the unconstitutional order involved in this action could not serve as a basis for a finding of contempt.

Moreover, it is demonstrably wrong to urge, as petitioners do, that the First Circuit "misread" this Court's decision in *Walker v. City of Birmingham*, 338 U.S. 307 (1967), in concluding that "transparently invalid" orders can be challenged by means of contempt proceedings. Petition at 7 (citing to A-33).[6] Although this Court affirmed the contempt convictions

[5] The First Circuit had previously suggested in no uncertain terms that a newspaper faced with a transparently unconstitutional and invalid prior restraint could test the order by violating it. In *United States v. Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980), the First Circuit declared moot a challenge by Arthur Andersen to a court order directing it to comply with an IRS subpoena of its workpapers for a client, after Andersen had surrendered the documents. The First Circuit, discussing this Court's decision in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), stated that Andersen could have kept its claim viable if it had "tested the court's order by violating it and contesting the resulting contempt sanction" — an option the Court noted was available to the media petitioners in *Nebraska Press*. *Id.* at 724. Of course, that is precisely what the Journal did here.

[6] Petitioner's brief strongly suggests, without actually so stating, that the "transparently invalid" exception to the usual rule requiring obedience to temporary restraining orders was created *ex nihilo* by the First Circuit in the context of this case. Indeed, petitioner's brief never even acknowledges the important fact that the words "transparently invalid" were expressly used by this Court in *Walker*. (388 U.S. at 315).

at issue in *Walker*, it specifically cautioned that "this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity." 388 U.S. at 315.[7] Quoting this Court's langauge verbatim, the First Circuit concluded that its "unmistakable import" was that "a transparently invalid order cannot form the basis for a contempt citation." (A-33) (footnote omitted).[8]

After adopting the principle explicitly alluded to by this Court in *Walker* — that a transparently invalid order cannot be the predicate for a contempt citation — the Court of Appeals simply applied this key principle to the facts in the record. The First Circuit neither created a new rule of law nor altered rules previously established by this Court. Rather, the court carefully analyzed the facts in the particular case before it in the light of clear and well-established precedent.

Petitioner's reliance on this Court's decision in *Walker* is misplaced for other reasons as well. In *Walker*, this Court took great care to distinguish "pure speech" from speech

[7] The jurisprudential implications of the "transparently invalid" exception noted in *Walker* are significant. That exception gives due recognition to the principle that no mandate should be subject to blind obedience. The individual retains the ultimate right to question the validity of an order promulgated by any authority; justice does not require that punishment should follow the failure to adhere to a transparently invalid order. Although transparently invalid judicial orders may indeed be rare, the recognition that they may exist and need not be obeyed is profoundly important. It is in this light that Judge Wisdom's statement that "court orders are not sacrosanct" (A-34) should be understood. *See also Johnson v. Virginia*, 373 U.S. 61 (1963).

[8] The omitted footnote from the First Circuit's opinion (n.26) contains citations to a legal treatise, to two state court contempt cases, and to the Fifth Circuit's opinion in *United States v. Dickinson*, 465 F.2d 496 (1972) (discussed *infra*).

mixed with conduct. Writing for the majority in *Walker*, Justice Stewart quoted with approval the following passage from *Cox v. Louisiana*, 379 U.S. 536, 555 (1965):

> " 'We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.' "

388 U.S. at 316. Here there is no dispute that "pure speech" was involved, and this fact further demonstrates that the First Circuit's decision is entirely consistent with *Walker*.[9]

Furthermore, it should be borne in mind that the First Circuit in this case in effect promulgated an additional procedural prerequisite to the invocation of the transparent invalidity exception. Specifically, in unambiguous dictum in its en banc opinion, the First Circuit announced that henceforth a publisher subject to a temporary restraining order which it considers to be transparently invalid should make a good faith effort to obtain emergency appellate relief. (A-48).[10] It

[9] Prior restraints on speech are, of course, presumptively unconstitutional. *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.")

[10] The First Circuit's promulgation of this further prerequisite to the invocation of the transparent invalidity exception highlights the fact-specific nature of the instant case. In view of the fact that the seeking of emergency appellate relief is now a prerequisite, there is no reasonable possibility that a case similar to the instant case will arise in the future. Given the statement contained in the en banc court's opinion, publishers now know precisely what they must do if they wish to avail themselves of the transparent invalidity exception.

As for the instant case, the en banc court specifically stated that it lacked "a clear conviction that timely emergency relief was available within the restraints governing the publisher's decision making" and that it would be "unfair to subject the publisher to the very substantial sanctions imposed by the district court because of its failure to follow the procedure we have just announced." (A-49).

is thus clear that the "transparently invalid" exception recognized in *Wolker* has in no sense been expanded by the First Circuit, but rather has been made the subject of special procedural requirements.

Finally, it is simply incorrect for petitioners to urge that the Court of Appeals' opinion in this action (written by a Judge of the Court of Appeals for the Fifth Circuit) is inconsistent with the Fifth Circuit's opinion in *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972). In actuality, the Fifth Circuit's opinion in that case supports the key principle on which the First Circuit's analysis is based. In *Dickinson*, the court explicitly acknowledged that transparent invalidity constituted an exception to the usual rule that a court order must be obeyed. *Id.* at 509.[11] The First Circuit cited *Dickinson* precisely for this legal point (A-33 n.26) and then distinguished those aspects of *Dickinson* which were dissimilar to the instant case. The First Circuit noted that *Dickinson* involved an order issued to protect a defendant's Sixth Amendment right to a fair trial, whereas the order in this case was issued "merely to protect an individual's interest in privacy." (A-43 n.65).[12] The instant case, in contrast to *Dickinson*, does not involve a tension between competing constitutional mandates; there simply is no genuine Fourth Amendment issue in this case.

[11] Several state high courts have also held that when the press is subject to a transparently invalid and unconstitutional prior restraint on publication, the order, if violated, may be defeated on the merits. *E.g., Cooper v. Rockford Newspapers, Inc.*, 50 Ill. App. 3d 250, 365 N.E.2d 746 (1977) (order not to publish editorial subject to collateral attack); *State v. Coe*, 101 Wash. 2d 364, 679 P.2d 353 (1984) (en banc) (prior restraint on publication of tape recordings subject to collateral attack); *Wood v. Goodson*, 253 Ark. 196 485 S.W.2d 213 (1972) (order not to publish what transpired in open court held void and subject to collateral attack).

[12] In distinguishing the *Dickinson* result, the First Circuit also noted that the decision predated the strict test relative to prior restraints enunciated by this Court in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). (A-43 n.65).

Conclusion.

For the reasons stated above, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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August 7, 1987.

Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-65

In The
Supreme Court of the United States
October Term, 1987

UNITED STATES OF AMERICA,
Petitioner,

v.

PROVIDENCE JOURNAL COMPANY and
CHARLES M. HAUSER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petition for Writ filed July 9, 1987
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EDITOR'S NOTE

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SECTION I

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 6, 1986	Application for issuance of show cause order—criminal contempt proceeding filed in United States District Court for the District of Rhode Island.
January 6, 1986	Affidavit in support of application for issuance of show cause order—criminal contempt proceeding filed.
January 6, 1986	Order to show cause—criminal contempt proceeding, granted by Chief Judge Boyle.
February 7, 1986	Agreed statement of facts filed.
February 10, 1986	Hearing held regarding motion to adjudge Providence Journal Company and Charles M. Hauser in contempt. The court takes the matter under advisement.
March 18, 1986	Opinion filed holding respondents in contempt of the order entered November 13, 1985. Hearing is scheduled for 10:00 a.m. March 27, 1986 for the purpose of imposing a penalty.
March 25, 1986	Stipulation filed for the purposes of the contempt proceedings against respondents Providence Journal Company and Charles M. Hauser that: (1) the net worth of respondent Providence Journal Company is in excess of $1,000,000; (2) the net worth of respondent Charles M. Hauser is in excess of $250,000; and (3) the respondents will not contest the imposition of fines, if any, on the ground that the court did not have sufficient evidence concerning the financial status of the respondents.
March 27, 1986	Hearing held regarding sentencing. The court takes the matter under advisement.

April 2, 1986	Opinion filed holding a penalty of fifty cents per copy is reasonable, and therefore a fine in the amount of $100,000 to be satisfied within sixty days is imposed against the Providence Journal Company. Mr. Hauser's sentence is suspended and he is placed on probation for a term of eighteen months on the usual conditions and is further ordered to perform 200 hours of public service in a program provided by the Probation Officer to be carried out within a period of eighteen months from the entry of this order.
April 3, 1986	Notice of appeal and fee filed.
April 3, 1986	Providence Journal Company's application for stay of fine pending appeal filed. Said application is granted without surety by agreement and such order enters.
April 3, 1986	Charles M. Hauser's application for stay pending appeal is filed. Said application is granted by agreement and such order enters.
June 2, 1986	Memo and order received from the Court of Appeals regarding Providence Journal Company and Hauser's motion to supplement the record which was granted. The District Court clerk is to send a certified copy of C.A. 85-707 to the Court of Appeals.
June 3, 1986	Certified copy of C.A. 85-707 sent to Court of Appeals as supplemental record; the transcript of the March 27, 1986 hearing is also sent to the Court of Appeals.
January 21, 1987	Mandate and pleadings returned. Order of the District Court reversed.

UNITED STATES DISTRICT COURT
FOR
THE DISTRICT OF RHODE ISLAND

IN THE MATTER OF APPLICATION TO ADJUDGE THE PROVIDENCE JOURNAL COMPANY AND ITS EXECUTIVE EDITOR, CHARLES M. HAUSER, IN CRIMINAL CONTEMPT	)	C.A. NO.: MISC. 86-003B

APPLICATION FOR ISSUANCE OF SHOW CAUSE ORDER—CRIMINAL CONTEMPT PROCEEDING

(Filed Jan. 6, 1986)

Now comes William A. Curran, Special Prosecutor appointed on December 16, 1985, and says:

1. On November 13, 1985, this Court entered an order enjoining various parties including The Providence Journal Company from distributing, disseminating and otherwise publishing the logs or airtels, or reports thereof, generated as a result of the electronic surveillance conducted at 168 Atwells Avenue, between March of 1962 and July of 1965, as they relate to Raymond J. Patriarca pending hearing at 10:00 a.m. on Friday, November 15, 1985. A copy of said order is attached hereto as Exhibit A.

2. Said order was in full force and effect from November 13, 1985, through November 15, 1985.

3. The Providence Journal Company and its Executive Editor, Charles M. Hauser, were made aware of the aforesaid order, through counsel, as of November 13, 1985, and The Providence Journal Company and its Executive

Editor, Charles M. Hauser, had at all relevant times full knowledge of its terms.

4. The Providence Journal Company and its Executive Editor, Charles M. Hauser, have failed to and refused to comply with and have disobeyed, disregarded and violated the provisions of said order by the following acts and conduct: By disseminating and publishing the said logs or airtels, or reports thereof, on November 14, 1985, while being knowledgeable of the said November 13, 1985 temporary restraining order, said publication being made in one or more articles contained in the newspapers published and distributed by The Providence Journal Company and its Executive Editor, Charles M. Hauser, as is more particularly shown by the affidavit of John F. Cicilline, Esquire, attached hereto as Exhibit B.

5. By reason of the failure and refusal of The Providence Journal Company and its Executive Editor, Charles M. Hauser, to comply with the provisions of said order, The Providence Journal Company and its Executive Editor, Charles M. Hauser, have committed criminal contempts of the authority of this Court.

WHEREFORE, complainant moves the Court for an order in the form annexed finding that probable cause exists to sustain findings of criminal contempts against The Providence Journal Company and its Executive Editor, Charles M. Hauser, and requiring The Providence Journal Company and its Executive Editor, Charles M.

Hauser, to answer and show cause why they should not be adjudged in criminal contempt of this Court, and, upon return of said order, to adjudge The Providence Journal Company and its Executive Editor, Charles M. Hauser, in criminal contempt of this Court for having disobeyed, disregarded, and violated the terms of said order and to punish The Providence Journal Company and its Executive Editor, Charles M. Hauser, for such criminal contempts in such manner as the Court may deem just and proper.

/s/ William A. Curran
Special Prosecutor
1210 Turks Head Building
Providence, RI 02903-2274

(Proof of Service Omitted)

EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Raymond J. Patriarca, Individually
and as Administrator of the Estate
of Raymond L.S. Patriarca

v.

Federal Bureau of Investigation

and

William H. Webster, Director

and

United States Department of Justice

and

Edwin Meese, Attorney General

and

The Providence Journal Company

and

WJAR Television Ten

ORDER

In the above entitled cause the plaintiffs motion for temporary restraining order is granted to the extent that the defendants, severally and individually are restrained from distrubing [sic], disseminating and otherwise publishing the logs or airtels, or reports thereof, generated as a result of the electronic surveillance conducted at 168 Atwells Avenue, between March of 1962 and July of 1965, as they relate to Raymond J. Patriarca. pending [sic] hearing at 10:00 a.m. on Friday, Nov 15, 1985

/s/ Francis J. Boyle
Chief Judge

Entered as an order of this court this 13th day of November, 1985.

/s/ Robert R. Henry
Deputy Clerk

The Providence Journal

East Bay Edition

© Providence Journal Co., Thursday, November 14, 1985 — Five Sections/84 Pages — 35 Cents; $1.70 per week by carrier

—Journal-Bulletin Photo by MICHAEL J.B. KELLY

THE PATRIARCA PAPERS: This July, 1978, photo shows FBI agents lugging boxes of transcripts of tapes recorded at the Providence office of crime figure Raymond L.S. Patriarca. His son, Raymond J. Patriarca, has filed a lawsuit attempting to block release of the tapes' contents.

RAYMOND L.S. PATRIARCA

'Ray tells Ray Jr. that when he gets married to marry an Italian girl as she will stand by you when you're in trouble, or won't call the police if you slap her in the mouth.'

RAYMOND J. PATRIARCA

Court restricts media use of FBI tapes on Patriarca; Journal decides to print

Son of reputed mob leader seeks to block excerpts concerning him

By PAUL DUGGAN
Journal-Bulletin Staff Writer

PROVIDENCE — A federal judge yesterday ordered the *Journal-Bulletin* not to publish information about mob leader Raymond J. "Junior" Patriarca obtained through illegal FBI surveillance. Citing the Constitution's guarantee of a free press, the newspaper today published an article despite the order.

The temporary restraining order signed by Chief Judge Francis J. Boyle of U.S. District Court also applies to WJAR-TV, Channel 10. A Channel 10 spokesman said yesterday that the station would comply.

Today's *Journal-Bulletin* story quotes from conversations between Patriarca and his father, Raymond L.S. Patriarca, the leader of organized crime in New England before his death last year.

The conversations took place between 1962 and 1965, while the FBI had an electronic eavesdropping device planted in the elder Patriarca's Federal Hill storefront. The *Journal-Bulletin*, after nine years of legal skirmishes, began obtaining summaries of the FBI's tape recordings earlier this year through the Freedom of Information Act.

★ ★ ★

THE YOUNGER Patriarca's lawyer, John F. Cicilline, has sued the newspaper, Channel 10 and the Justice Department, charging that public "dissemination" of the FBI material would be an "unwarranted invasion" of his client's privacy. The lawsuit deals only with material pertaining to the younger Patriarca, not to his father.

Patriarca, now 40, was 17 to 20

Turn to COURT, Page A-17

Patriarca Sr. to son: 'You only lie to cops and people you don't know'

By ROBERT KRAMER
Journal-Bulletin Staff Writer

The Patriarca tapes

First in a series

At first, Raymond L.S. Patriarca did not want his son to follow him into crime.

When Raymond J. "Junior" Patriarca graduated from high school in 1962, he wanted to be a lawyer, a goal encouraged by his father.

At the time, the elder Patriarca was head of the New England crime family of La Cosa Nostra, a position he held until his death in 1984. ' directed his crimina' enterprises from his office on Atwells Avenue in Providence. From 1962 through 1965 the FBI had an electronic listening device in the office and recorded and transcribed hundreds of conversations between Patriarca and his henchmen and allies.

The device also picked up conversations between Patriarca and his son.

★ ★ ★

WHAT THEY SHOW is a father worried about his son getting into college and the boy's relations with girls, a father full of advice on how to be a man and pick a woman.

Records of the Atwells Avenue conversations, obtained from the FBI by the *Journal-Bulletin*, show that Junior's goal of becoming a lawyer ran into trouble even before he got to college.

Junior was rejected by Dartmouth, Boston College and Boston University, according to the FBI logs. Patriarca claimed that the rejections were caused by "his family's background," but admitted that "his boy flunked the College Board entrance exams."

Patriarca spent a lot of time looking for contacts who could get the rejections reversed. Finally, however, Junior went to the University of Rhode Island.

★ ★ ★

JUST A FEW WEEKS into his first semester at URI, Junior needed his father's influence. According to the Sept. 24, 1962, log: "Ray discusses Ray Jr.'s trouble in changing a course at URI where he is starting. He mentions that (name withheld by FBI) had just called and had talked with the governor (John A. Notte Jr.). The governor is standing by, (name withheld) wanted to know what course the boy wants to take."

The FBI agent writing the log concluded this entry with: "(I puked here)."

Turn to TAPES, Page A-16

Attachment A

(p. A-17)

Court

Continued from Page One

years old at the time his father's office was under surveillance. The FBI, which has since conceded that the eavesdropping was illegal, destroyed the tapes after making transcripts and writing summaries.

Boyle said his restraining order would remain in effect at least until a hearing tomorrow at which lawyers for the *Journal-Bulletin* and Channel 10 will ask him to vacate it and Cicilline will ask him to make it permanent.

Cicilline said he was "delighted" by Boyle's decision.

Matthew F. Medeiros, lawyer for the *Journal-Bulletin* and Channel 10, said he was "disappointed."

Charles McCorkle Hauser, vice president and executive editor of the *Journal-Bulletin,* said in a statement last night that the newspaper decided to print the story in spite of Boyle's order because the First Amendment to the Constitution "prohibits what is known as prior restraint—imposing censorship in advance of publication."

"We have the greatest respect for Judge Boyle, but in this case we are convinced that his order would impose a prior restraint in violation of the Constitution," Hauser said. "For that reason, we have decided to publish in Thursday's *Journal-Bulletin* our article about Raymond J. 'Junior' Patriarca, the first of a series of stories based on the Patriarca tapes."

* * *

THE EAVESDROPPING generated more than 7,000 pages of typed transcripts, summaries and FBI appraisals

of the information. *Journal-Bulletin* metropolitan managing editor Joel P. Rawson and the newspaper has received "the bulk" of the material from the FBI and had been expecting more.

But Boyle also temporarily barred the FBI from releasing more material without expunging references to the younger Patriarca, who allegedly succeeded his father as the leader of organized crime in New England.

Everett C. Sammartino, an assistant U.S. attorney, said the FBI would comply with the order, but that he would argue at tomorrow's hearing that it should be vacated.

Channel 10 aired a news story Nov. 6 based on Patriarca material it already has obtained from the FBI.

But Channel 10 news director David B. Baer said yesterday that the station would abide by Boyle's order. Baer said he was "glad" that Boyle limited his ruling to the younger Patriarca and did not prohibit the use of all information collected and released by the FBI.

• • •

LAWYERS in the case, emerging from a private, half-hour chambers conference with Boyle yesterday, said the judge based his order on his interpretation of a 1979 federal appeals court ruling that denied the *Journal-Bulletin* access to the Patriarca material.

The *Journal-Bulletin* originally requested the material under the Freedom of Information Act in 1976, but FBI officials refused to provide it, saying the information act

required them to weigh Patriarca's right to privacy against the public's right to know.

The law allows the government to withhold information when it decides that the public's interest does not outweigh an individual's right to privacy.

At the time, the FBI said that releasing the material would contribute to an "unwarranted invasion" of the elder Patriarca's privacy.

The *Journal-Bulletin* appealed the FBI's decision to Judge Raymond J. Pettine of U.S. District Court, and Pettine ordered the agency to release the material. But Pettine's ruling was overturned in 1979 by the U.S. Circuit Court of Appeals in Boston.

Cicilline said yesterday that in his view, the appeals court ruling permanently prohibited the release of the material because the FBI had obtained it illegally.

• • •

BUT LAWYERS for the *Journal-Bulletin* and Channel 10 said that in their view, the appeals court did not prohibit the release of the material. It simply ruled that the FBI had the option of withholding the material if it deemed that the elder Patriarca's right to privacy outweighed the public's interest.

Judge Boyle agreed yesterday with Cicilline's interpretation, according to lawyers for both sides.

The FBI, reversing itself, began releasing the material last spring after the *Journal-Bulletin* again requested it under the Freedom of Information Act.

Sammartino, the assistant U.S. attorney, said yesterday that the FBI changed its mind largely because of the elder Patriarca's death in 1984. Cicilline, however, said he has no idea whether the FBI gave fair consideration to the younger Patriarca's right to privacy.

"I don't know what the process was by which the FBI and the Justice Department did a 180-degree turn," Cicilline said. "I would have thought that whenever this review process was going on, they would have notified (Cicilline and Patriarca) about it."

Even if Cicilline's interpretation of the appeals court ruling is incorrect, and even if the FBI did objectively consider his client's right to privacy, Cicilline said, the agency's decision to release the information was unjustified. He said that in this case his client's interests outweigh the public's right to know.

BUT MEDEIROS, lawyer for the *Journal-Bulletin* and Channel 10, argued that regardless of how the media obtained the material, they have a constitutional right to publish and broadcast it.

Medeiros said the U.S. Supreme Court, in blocking the government's attempt to stop publication of the Pentagon Papers, ruled in 1971 that regardless of how a media outlet obtains material—legally or otherwise—once it has gotten that material it has a First Amendment right to disseminate it.

"My position is a little bit different," Cicilline responded. "I think in this circumstance—where the court of appeals has spoken, and said the information ought not to be used (because) of privacy rights—then newspapers cannot publish it in those circumstances."

The younger Patriarca, whose name has emerged in the current Boston trial of five alleged members of his father's crime family, has never been convicted of a crime. A charge of receiving stolen goods was dismissed in 1971 after two prosecution witnesses declined to testify.

In 1976, a participant in the 1975 Bond Vault heist, the largest robbery in Rhode Island history, said the younger Patriarca helped plan the holdup and was to get a share of the nearly $3 million in loot. But he was never charged in the case.

THE JOURNAL'S STATEMENT

This is the text of a statement issued last night by Charles McCorkle Hauser, vice president and executive editor of the *Journal-Bulletin*, in response to the ruling of U.S. District Judge Francis J. Boyle in the Patriarca tapes case:

"The strength and integrity of the American press are based on the First Amendment to the Constitution of the United States, which guarantees freedom of speech and of the press.

"According to the U.S. Supreme Court, that amendment prohibits what is known as prior restraint—imposing censorship in advance of publication.

"We have the greatest respect for Judge Boyle, but in this case we are convinced that his order would impose a prior restraint in violation of the Constitution. For that reason, we have decided to publish in today's *Journal-Bulletin* our article about Raymond J. "Junior" Patri-

arca, the first of a series of stories based on the Patriarca tapes.

"Our lawyers have assured us that Judge Boyle has acted unconstitutionally. However, the decision to publish is solely an editorial judgment.

"While not relevant to the constitutional issue, it is worth noting that the *Journal-Bulletin* obtained the Patriarca tapes in a legal and proper manner after fighting to get them for nine years. They involve people and activities of high public interest, and we believe it is in the best interests of the public to read this material."

(p. A-16)

Tapes

Continued from Page One

For part of his time at school, Junior had his own house. "RLP says it was a mistake to rent a home for his son at URI. He received an $87.00 phone bill one month. The IRS heard about it, figured the boy was booking and staked the place out. The new chief of police at Narragansett Beach (Richard A. Colvin) called RLP and warned him of the impending difficulties his son was getting into," according to a log.

But even Governor Notte couldn't keep Junior in school. By October, 1963, Junior had flunked out. Patriarca told him not to be discouraged. He returned to school in the spring of 1964 but, before the year was over, he was out again, according to the logs.

IF PATRIARCA was disappointed, his recorded conversations don't show it. Instead, he talked about putting his "son in automobile business or some other business before he dies. . . . Ray says you don't need a degree to be successful, you just need the backing."

Patriarca provided Junior with money and cars—a Jaguar and a Corvette, among others. Junior raced cars, both on the street and track.

And, after his own fashion, Patriarca gave Junior paternal guidance, according to the logs:

"Ray and Ray Jr. have an argument about taking the wrong car. . . . Ray asked him what he did with the $500 he had. Ray tells Ray Jr. he won't stand for lying from him. He tells him you only lie to cops and people you don't know."

"Raymond continues that you have to be a man to rob and that he never robbed any poor people in his life."

"Ray tells Ray Jr. that when he gets married to marry an Italian girl as she will stand by you when you're in trouble, or won't call the police if you slap her in the mouth."

PATRIARCA WAS NOT always an approving father, but he gave Junior help along with lectures. The logs document Patriarca's reaction when Junior had trouble with a girlfriend:

"Ray says (he) gives kid too much freedom and look what happens. Girl two months pregnant. (Name withheld by FBI) is with Ray and young Ray. If anything goes wrong, young Ray will have to take the blame. Ray tells the kid if you make the cookie, got to eat the cookie.

Girl will come down driving a Pontiac and you tell this girl where to meet this girl so she can take girl to see the doctor and (name withheld) is going to arrange appointment with the doctor on Thursday. Meet at 1:30. . . ."

Patriarca sometimes took an interest in Junior's male friends also.

In one of the logs an agent writes that one of Junior's friends reported to Patriarca regarding his son's activities.

Perhaps because he had his own spy, Patriarca was suspicious of another young man who tried to befriend Junior. "RLP warns his son this boy may be a plant by the 'feds,' " according to a log.

PATRIARCA HAD a long criminal record but he didn't want his son to follow in his footsteps.

After Junior has gotten a speeding ticket, "Raymond tells him to behave himself—that he has a good reputation and he should try to keep it."

Another time, according to a log, "Raymond says he has told his son to always respect the police and be courteous to them. If Raymond Jr. is wrong, Raymond says, he will personally beat him up in the police station. If he is not wrong, Raymond will bring suit against the Providence PD if they continue to harass the boy."

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According to recordings played and testimony given in the U.S. District Court trial—currently in progress in Boston—of five men charged with membership in the Patriarca crime family, Junior held an important position in the mob even before the death of his father last year.

BUT, AS RECENTLY as 1981, key members of the Boston branch of the family expressed dissatisfaction with Patriarca's plan to have Junior take over the top job.

"I can't see the kid stepping in the picture for the simple reason, number one, he's too young." Nicolo Angiulo said of Junior, who was 35 years old at the time. "They'll never buy it. That's number one."

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The boss of a Cosa Nostra crime family is chosen by "soldiers," the rank and file of the family, and then ratified by the Commission, the bosses of the most powerful Cosa Nostra families in the country. By the time Patriarca died in 1984, Junior had apparently overcome the objections of most family members and, according to the FBI, was elected to succeed his father.

Style
Knits are nice as winter hits
Page B-1

Sports
Red Sox send Ojeda to Mets
Page C-7

City
Garbage truck kickback trial is postponed for one week
Page C-1

The Evening Bulletin

122nd year, No. 221, 84 pages - 5 sections | PROVIDENCE, RHODE ISLAND, THURSDAY, NOVEMBER 14, 1985 | © 1985 The Providence Journal Co. 35¢/$1.70 per week by carrier

Today's late news

Victims of police spying awarded $306,250 total

CHICAGO — A federal judge today approved a $306,250 settlement for 20 groups and individuals who accused police of spying on church, anti-war and other organizations during the 1960s and 1970s. The judge agreed to hear arguments from five other plaintiffs seeking to test the constitutionality of the police actions. The tentative agreement approved by U.S. District Judge Susan Getzendanner will pay $20,625 to each of 10 organizations and $10,000 each to 10 individuals. The 25 individuals and civic groups sued the city in 1974, contending a Chicago police department unit systematically spied on and disrupted lawful activities of community, church, anti-war and civic groups. That unit, disbanded in 1975, was dubbed the Red Squad.

U.S., Italy join forces

WASHINGTON — Trying to bury recent disagreements over Italy's handling of the Achille Lauro ship hijacking, U.S. and Italian officials announced new joint efforts to combat international terrorism. Attorney General Edwin Meese and Italy's Interior Minister Oscar Luigi Scalfaro announced that terrorism would be included in the work of the Joint Italian-American Working Group to Combat Narcotics Trafficking and Organized

Court, Journal clash over use of tapes

Despite ruling on Patriarca suit newspaper decides to print excerpts from FBI recordings

By PAUL DUGGAN
and TRACY BRETON
Journal-Bulletin Staff Writers

PROVIDENCE — A federal judge yesterday ordered the *Journal-Bulletin* not to publish information about reputed mob leader Raymond J. "Junior" Patriarca obtained through illegal FBI surveillance. Citing the Constitution's guarantee of a free press, the newspaper today published an article despite the order.

The temporary restraining order signed by Chief Judge Francis J. Boyle of U.S. District Court also applies to WJAR-TV, Channel 10. A Channel 10 spokesman said yesterday that the station would comply.

John F. Cicilline, lawyer for Patriarca, said today he is "aghast" at the *Journal-Bulletin's* decision to defy a court order. He said he is considering taking further legal action against the newspaper.

Judge Boyle said he would not take any punitive action on his own.

Today's *Journal-Bulletin* story quotes from conversations between Patriarca and his father, Raymond L.S. Patriarca, the leader of organized crime in New England before his death last year.

The conversations took place between 1962 and 1965, while the FBI had an electronic eavesdropping device

See COURT, Page A-17

Fatherly advice from Patriarca Sr.

By ROBERT KRAMER
Journal-Bulletin Staff Writer

At first, Raymond L.S. Patriarca did not want his son to follow him into crime.

When Raymond J. "Junior" Patriarca was graduated from high school in 1962, he wanted to be a lawyer — a goal encouraged by his father.

At the time, the elder Patriarca was head of the New England crime family of La Cosa Nostra, a position he held until his death in 1984. He directed his criminal enterprises from his office on Atwells Avenue, Providence.

From 1962 through 1965, the FBI had an electronic listening device in the office and recorded and transcribed hundreds of conversations between Patriarca and his henchmen and allies.

The device also picked up conversations between Patriarca and his son.

The Patriarca tapes

First in a series

WHAT THEY SHOW is a father worried about his son's getting into college and the boy's relations with girls, a father full of advice on how to be a man and pick a woman.

Records of the Atwells Avenue conversations, obtained from the FBI by the *Journal-Bulletin*, show that Junior's goal of becoming a lawyer ran into trouble even before he got to college.

Junior was rejected by Dartmouth, Boston College and Boston University, according to the FBI logs. Patriarca contended that the rejections were caused by "his family's background," but admitted that "his boy flunked the College Board entrance exams."

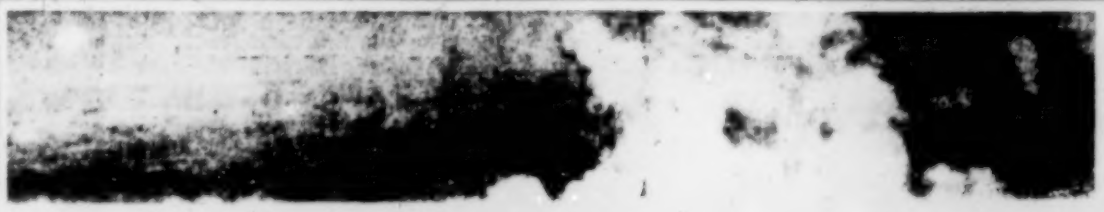
Patriarca spent a lot of time looking for contacts who could get the rejections reversed. Finally, however, Junior went to the University of Rhode Island.

* * *

JUST A FEW WEEKS into his first semester at URI, Junior needed his father's influence. According to the Sept. 24, 1962, log: "Ray discusses Ray Jr.'s trouble in changing a course at URI, where he is starting. He mentions that (name withheld by FBI) had just called and had talked with the governor (John A. Notte Jr.). The governor is standing by (name withheld), who wanted to know what course the boy wants to take."

The FBI agent writing the log concluded this entry with: "(I puked here)."

See TAPES, Page A-16



Big toll feared in Colombian eruption, flood

Attachment B

(p. A-17)

Court

Continued from Page One

planted in the elder Patriarca's Federal Hill storefront. The *Journal-Bulletin,* after nine years of legal skirmishes, began obtaining summaries of the FBI's tape recordings earlier this year through the Freedom of Information Act.

* * *

CICILLINE sued the newspaper, Channel 10 and the Justice Department, charging that public "dissemination" of the FBI material would be an "unwarranted invasion" of his client's privacy. The lawsuit deals only with material pertaining to the younger Patriarca, not to his father.

Patriarca, now 40, was 17 to 20 years old at the time his father's office was under surveillance. The FBI, which has since conceded that the eavesdropping was illegal, destroyed the tapes after making transcripts and written summaries.

Boyle said his restraining order would remain in effect at least until a hearing tomorrow at which lawyers for the *Journal-Bulletin* and Channel 10 will ask him to vacate it and Cicilline will ask him to make it permanent.

Boyle said this morning he had no comment on the newspaper's defiance of his order. He said he did not plan to take action as a result of the newspaper story. Apparently, though, he would consider acting against the newspaper if Cicilline or another party to the suit asked him to.

"That's not up to me," Boyle said. "That is not part of the system, as I understand it. . . . I thought the system of justice involved an adversary system. The judge is not a party."

• • •

CICILLINE SAID yesterday he was "delighted" by Boyle's decision. This morning, he said he criticized the newspaper for violating the court order.

"The Providence *Journal* has written editorials condemning teachers for defying court orders, and condemning people who refuse to answer questions after they are given immunity before a grand jury," Cicilline said when reached at his law office. "The *Journal* has taken the righteous position that the law is the law. But when it serves their own ends, they do it differently."

"I think this is a clear indication of malice," he added.

Cicilline said his client, Patriarca, was "unavailable for comment" this morning, but might have a statement later in the day. He said he would also decide later in the day what action he would take as a result of the newspaper's story.

Freedom of Information Act in 1976, but FBI officials refused to provide it, saying the information act required them to weigh Patriarca's right to privacy against the public's right to know.

The law allows the government to withhold information when it decides that the public's interest does not outweigh an individual's right to privacy.

At the time, the FBI said that releasing the material would contribute to an "unwarranted invasion" of the elder Patriarca's privacy.

The *Journal-Bulletin* appealed the FBI's decision to Judge Raymond J. Pettine of U.S. District Court, and Pettine ordered the agency to release the material. But Pettine's ruling was overturned in 1979 by the U.S. Circuit Court of Appeals in Boston.

Cicilline said yesterday that in his view, the appeals court ruling permanently prohibited the release of the material because the FBI had obtained it illegally.

• • •

BUT LAWYERS for the *Journal-Bulletin* and Channel 10 said that in their view, the appeals court did not prohibit the release of the material. It simply ruled that the FBI had the option of withholding the material if it deemed that the elder Patriarca's right to privacy outweighed the public's interest.

Judge Boyle agreed yesterday with Cicilline's interpretation, according to lawyers for both sides.

The FBI, reversing itself, began releasing the material last spring after the *Journal-Bulletin* again requested it under the Freedom of Information Act.

Everett C. Sammartino, an assistant U.S. attorney, said yesterday that the FBI changed its mind largely because of the elder Patriarca's death in 1984. Cicilline, however, said he has no idea whether the FBI gave fair consideration to the younger Patriarca's right to privacy.

"I don't know what the process was by wihch the FBI and the Justice Department did a 180-degree turn," Cicilline said. "I would have thought that whenever this review process was going on, they would havc notified (Cicilline and Patriarca) about it."

Even if Cicilline's interpretation of the appeals court ruling is incorrect, and even if the FBI did objectively consider his client's right to privacy, Cicilline said, the agency's decision to release the information was unjustified. He said that in this case his client's interests outweigh the public's right to know.

BUT MEDEIROS, lawyer for the *Journal-Bulletin* and Channel 10, argued that regardless of how the media obtained the material, they have a constitutional right to publish and broadcast it.

Medeiros said the U.S. Supreme Court, in blocking the government's attempt to stop publication of the Pentagon Papers, ruled in 1971 that regardless of how a media outlet obtains material—legally or otherwise—once it has gotten that material it has a First Amendment right to disseminate it.

"My position is a little bit different," Cicilline responded. "I think in this circumstance—where the court of appeals has spoken, and said the information ought not to be used (because) of privacy rights—then newspapers cannot publish it in those circumstances."

The younger Patriarca has never been convicted of a crime.

JOURNAL STATEMENT

This is the text of a statement issued last night by Charles McCorkle Hauser, vice president and executive editor of the *Journal-Bulletin,* in response to the ruling of U.S. District Judge Francis J. Boyle in the Patriarca tapes case:

"The strength and integrity of the American press are based on the First Amendment to the Constitution of the United States, which guarantees freedom of speech and of the press.

"According to the U.S. Supreme Court, that amendment prohibits what is known as prior restraint—imposing censorship in advance of publication.

"We have the greatest respect for Judge Boyle, but in this case we are convinced that his order would impose a prior restraint in violation of the Constitution. For that reason, we have decided to publish in today's *Journal-Bulletin* our article about Raymond J. "Junior" Patriarca, the first of a series of stories based on the Patriarca tapes.

"Our lawyers have assured us that Judge Boyle has acted unconstitutionally. However, the decision to publish is solely an editorial judgment.

"While not relevant to the constitutional issue, it is worth noting that the *Journal-Bulletin* obtained the Patriarca tapes in a legal and proper manner after fighting to get them for nine years. They involve people and activities of high public interest, and we believe it is in the best interests of the public to read this material."

(p. A-16)

Tapes

Continued from Page One

For part of his time at school, Junior had his own house. "RLP says it was a mistake to rent a home for his son at URI. He received an $87.00 phone bill one month. The IRS heard about it, figured the boy was booking and staked the place out. The new chief of police at Narragansett Beach (Richard A. Colvin) called RLP and warned him of the impending difficulties his son was getting into," according to a log.

But even Governor Notte couldn't keep Junior in school. By October, 1963, Junior had flunked out. Patriarca told him not to be discouraged. He returned to school in the spring of 1964 but, before the year was over, he was out again, according to the logs.

IF PATRIARCA was disappointed, his recorded conversations don't show it. Instead, he talked about putting his "son in automobile business or some other business before he dies. . . . Ray says you don't need a degree to be successful, you just need the backing."

Patriarca provided Junior with money and cars — a Jaguar and a Corvette, among others. Junior raced cars, both on the street and track.

And, after his own fashion, Patriarca gave Junior paternal guidance, according to the logs:

"Ray and Ray Jr. have an argument about taking the wrong car. . . . Ray asked him what he did with the $500 he had. Ray tells Ray Jr. he won't stand for lying

from him. He tells him you only lie to cops and people you don't know."

"Raymond continues that you have to be a man to rob and that he never robbed any poor people in his life."

"Ray tells Ray Jr. that when he gets married to marry an Italian girl as she will stand by you when you're in trouble, or won't call the police if you slap her in the mouth."

PATRIARCA WAS NOT always an approving father, but he gave Junior help along with lectures. The logs document Patriarca's reaction when Junior had trouble with a girlfriend:

"Ray says (he) gives kid too much freedom and look what happens. Girl two months pregnant. (Name withheld by FBI) is with Ray and young Ray. If anything goes wrong, young Ray will have to take the blame. Ray tells the kid if you make the cookie, got to eat the cookie. Girl will come down driving a Pontiac and you tell this girl where to meet this girl so she can take girl to see the doctor and (name withheld) is going to arrange appointment with the doctor on Thursday. Meet at 1:30. . . ."

Patriarca sometimes took an interest in Junior's male friends also.

In one of the logs an agent writes that one of Junior's friends reported to Patriarca regarding his son's activities.

Perhaps because he had his own spy, Patriarca was suspicious of another young man who tried to befriend Junior. "RLP warns his son this boy may be a plant by the 'feds,'" according to a log.

PATRIARCA HAD a long criminal record but he didn't want his son to follow in his footsteps.

After Junior has gotten a speeding ticket, "Raymond tells him to behave himself — that he has a good reputation and he should try to keep it."

Another time, according to a log, "Raymond says he has told his son to always respect the police and be courteous to them. If Raymond Jr. is wrong, Raymond says, he will personally beat him up in the police station. If he is not wrong, Raymond will bring suit against the Providence PD if they continue to harass the boy."

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UNITED STATES DISTRICT COURT
FOR
THE DISTRICT OF RHODE ISLAND

IN THE MATTER OF	)	
APPLICATION TO ADJUDGE	)	
THE PROVIDENCE JOURNAL	)	C.A. NO.:
COMPANY AND ITS	)	MISC.
EXECUTIVE EDITOR,	)	86-003B
CHARLES M. HAUSER, IN	)	
CRIMINAL CONTEMPT	)	

AFFIDAVIT IN SUPPORT OF APPLICATION FOR ISSUANCE OF SHOW CAUSE ORDER-CRIMINAL CONTEMPT PROCEEDING

(Filed Jan. 6, 1986)

Now comes John F. Cicilline, who, on oath, deposes and says:

1. That he is the Attorney for Raymond J. Patriarca, individually and as administrator of the estate of Raymond L. S. Patriarca, in connection with a matter brought in this Honorable Court entitled *Raymond J. Patriarca, Individually and as Administrator of the Es-*

tate of Raymond L. S. Patriarca, v. The Federal Bureau of Investigation, William H. Webster, Director, United States Department of Justice, Edwin Meese, Attorney General, The Providence Journal Company, and WJAR Television Ten, C.A. No.: 85-0707B.

2. On November 8, 1985, he filed in behalf of Raymond J. Patriarca, individually and as administrator of the estate of Raymond L. S. Patriarca, a complaint in the United States District Court for the District of Rhode Island to declare unlawful dissemination by the defendants in the matter referred to in the preceding paragraph of logs and airtels compiled during the course of an electronic surveillance during the years 1962 through 1965 at 168 Atwells Avenue in Providence.

3. The complaint asserted, among other things, that the Department of Justice and its Attorney General authorized the release of the illegally obtained logs and airtels to The Providence Journal Company pursuant to a request made by The Providence Journal Company and that the dissemination, publication, and distribution of these logs and airtels served no public purpose, and, in fact, constituted an unwarranted invasion of the plaintiff's personal privacy and that of his late father.

4. On November 13, 1985, Francis J. Boyle, Chief Judge of the District Court for the District of Rhode Island entered an order temporarily restraining said defendants severally and individually from distributing, disseminating, and otherwise publishing the logs, airtels, or reports thereof, generated as a result of the electronic surveillance conducted at 168 Atwells Avenue between March of 1962 and July of 1965 as they relate to Raymond J. Patriarca pending hearing at 10 a.m. on Friday, November 15, 1985.

5. Each defendant in the action referred to in Paragraph 2 above had notice of the Court's order; and, more specifically, The Providence Journal Company was notified of the Court's order on or before November 14, 1985.

6. The party defendants to the action identified in Paragraph 2 and, in particular, The Providence Journal Company and its Executive Editor, Charles M. Hauser, were knowledgeable of the terms and conditions of the aforesaid order.

7. Notwithstanding their knowledge of the order The Providence Journal Company and its Executive Editor, Charles M. Hauser, on November 14, 1985, distributed, disseminated and published the logs, airtels, and reports thereof as is evidenced by attachments A & B (news articles appearing in The Providence Journal Bulletin and The Evening Bulletin both of November 14, 1985).

8. The knowledge of The Providence Journal Company and its Executive Editor, Charles M. Hauser, of the November 13, 1985, order and the decision by them to disregard, disobey and violate said order are clearly set forth in publications by The Providence Journal Company and its Executive Editor, Charles M. Hauser, in attachments A & B.

9. As a result of said publication, distribution and dissemination, Raymond J. Patriarca's right to privacy has been violated and invaded causing him irreparable harm.

10. The dissemination, distribution and publication of the aforesaid materials was done willfully, with malice and disrespect for the Court.

/s/ J. F. Cicilline
John F. Cicilline, Esquire

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

Subscribed and sworn to before me this 6th day of January, 1986.

/s/ William A. Curran
Notary Public

(Proof of Service Omitted)

UNITED STATES DISTRICT COURT
FOR
THE DISTRICT OF RHODE ISLAND

IN THE MATTER OF	)	
APPLICATION TO ADJUDGE	)	
THE PROVIDENCE JOURNAL	)	C.A. NO.:
COMPANY AND ITS	)	Misc. 86-003 B
EXECUTIVE EDITOR,	)	
CHARLES M. HAUSER, IN	)	
CRIMINAL CONTEMPT	)	

ORDER TO SHOW CAUSE-CRIMINAL CONTEMPT PROCEEDING

(Received Jan. 6, 1986)

On consideration of the application by William A. Curran, Special Prosecutor, that The Providence Journal Company and its Executive Editor, Charles M. Hauser, be adjudged in criminal contempt of this Court, it is ORDERED:

Probable cause having been shown that The Providence Journal Company and its Executive Editor, Charles M. Hauser, are in criminal contempt of this Court due to a violation of an order of this Court dated November 13, 1985, The Providence Journal Company and its Executive Editor, Charles M. Hauser, shall appear before this Court in Courtroom 316 on the 10th day of February, 1986, at 9:30 a.m. or as soon thereafter as the matter may be heard, and show cause, if any there be, why an order should not be made adjudging The Providence Journal Company and its Executive Editor, Charles M. Hauser, in criminal contempt of this Court by reason of knowingly and willfully disobeying an order of this Court entered on November 13, 1985, restraining The Providence Jour-

nal Company, among others, from distributing, disseminating and otherwise publishing the logs or airtels, or reports thereof, generated as a result of the electronic surveillance conducted at 168 Atwells Avenue between March of 1962 and July of 1965, as they relate to Raymond J. Patriarca pending hearing at 10:00 a.m. on Friday, November 15, 1985, The Providence Journal and its Executive Editor, Charles M. Hauser, having knowledge of this Court's November 13, 1985 order, but nevertheless disseminating and publishing the said logs or airtels, or reports thereof, on November 14, 1985, in one or more articles contained in the newspapers published and distributed by The Providence Journal Company and its Executive Editor, Charles M. Hauser, and to be dealt with accordingly.

SO ORDERED.

/s/ Francis J. Boyle
Francis J. Boyle, Chief Judge
United States District Court
District of Rhode Island
January 6, 1985

(Proof of Service Omitted)

UNITED STATES DISTRICT COURT
FOR
THE DISTRICT OF RHODE ISLAND

IN THE MATTER OF	)	
APPLICATION TO ADJUDGE	)	
THE PROVIDENCE JOURNAL	)	
COMPANY AND ITS	)	MISC. 86-003B
EXECUTIVE EDITOR,	)	
CHARLES M. HAUSER, IN	)	
CRIMINAL CONTEMPT	)	

AGREED STATEMENT OF FACTS

(Received February 7, 1986)

The parties agree that the following are facts subject to objection to admissibility into evidence based on relevancy or materiality.

1. On November 8, 1985, Raymond J. Patriarca, individually and as administrator of the estate of Raymond L.S. Patriarca, filed a complaint seeking, among other things, an injunction against The Providence Journal Company and others from publication of information gathered by the Federal Bureau of Investigation.

2. Also on November 8, 1985, Raymond J. Patriarca filed a motion for a temporary restraining order and/or injunctive relief.

3. A chambers conference was held on the afternoon of November 13, 1985, regarding Raymond J. Patriarca's motion for a temporary restraining order.

4. Among those in attendance at that conference were attorneys representing The Providence Journal Company, the Federal Bureau of Investigation and Mr. Patriarca.

5. At that conference the Court indicated a willingness to have a hearing regarding injunctive relief the next morning.

6. The Court entered a temporary restraining order on November 13, 1985, in the form hereto attached marked "1."

7. The Providence Journal Company and its Executive Editor, Charles M. Hauser, were made aware of the aforesaid order, through counsel, as of November 13, 1985, and the Providence Journal Company and its Executive Editor, Charles M. Hauser, had at all relevant times full knowledge of its terms.

8. On November 14, 1985, in separate news articles in its morning and evening editions, The Providence Journal Company distributed, disseminated and otherwise published articles in the form hereto attached marked "2" and "3."

9. After hearing on November 15, 1985, (Transcript attached marked "4"), the Court orally continued the temporary restraining order in effect.

10. After hearing on November 19, 1985 (Transcript attached marked "5"), the Court vacated its November 13, 1985 temporary restraining order, by order in the form attached marked "6."

11. The material which was the subject matter of the publication by The Providence Journal Company on November 14, 1985, was illegally obtained by the FBI. The material was lawfully obtained by The Providence Journal Company, earlier in the year before the time of publication, under the Freedom of Information Act from

the FBI. Copies of the following, marked as indicated, are attached:

7a. Letter from Robert Kramer to FBI dated Sept. 26, 1984.

7b. Letter from FBI to Robert Kramer dated Oct. 9, 1984.

7c. Letter from FBI to Mr. Kramer dated Dec. 5, 1984.

7d. Letter from FBI to Mr. Kramer dated Jan. 16, 1985 (2 pages).

7e. Letter from Mr. Kramer to FBI dated Jan. 23, 1985.

7f. Letter from FBI to Mr. Kramer dated Feb. 22, 1985.

7g. Letter from FBI to Mr. Kramer dated June 13, 1985.

12. The material which was the subject matter of the publication by the Journal on November 14, 1985, was in the possession of, and had been, or was about to be, published by other media. Tape transcripts of broadcasts by Channel 12 (WPRI-TV) on November 14, 15, and 18, 1985 are attached hereto marked "8a," "8b" and "8c." A copy of an article published by the *Hartford Courant* on September 22, 1985 is attached hereto marked "8d."

/s/ William A. Curran
William A. Curran
Special Prosecutor

/s/ Edward F. Hindle

/s/ Knight Edwards

/s/ Joseph V. Cavanagh, Jr.
Attorneys for The Providence
Journal Company and
Charles M. Hauser

UNITED STATES DISTRICT COURT
FOR
THE DISTRICT OF RHODE ISLAND

IN THE MATTER OF	)	
APPLICATION TO ADJUDGE	)	
THE PROVIDENCE JOURNAL	)	
COMPANY AND ITS	)	MISC. 86-003B
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CHARLES M. HAUSER, IN	)	
CRIMINAL CONTEMPT	)	

SUPPLEMENTAL AGREED STATEMENT OF FACTS

The parties agree that the following are facts subject to objection to admissibility into evidence based on relevancy or materiality.

1. The Providence Journal Company between issuance of the November 13, 1985 temporary restraining order marked "1" and its publications marked "2" and "3" took no steps in any court to seek any stay, recision, modification, vacation, reversal or review of the temporary restraining order.

/s/ William A. Curran
William A. Curran
Special Prosecutor

/s/ Edward F. Hindle

/s/ Knight Edwards

/s/ Joseph V. Cavanagh, Jr.
Attorneys for The Providence
Journal Company and
Charles M. Hauser

1

IN THE DISTRICT COURT OF THE
UNITED STATES FOR
THE DISTRICT OF RHODE ISLAND

Raymond J. Patriarca, Individually
and as Administrator of the Estate
of Raymond L.S. Patriarca

v.

Federal Bureau of Investigation

and

William H. Webster, Director

and

United States Department of Justice

and

Edwin Meese, Attorney General

and

The Providence Journal Company

and

WJAR Television Ten

ORDER

In the above entitled cause the plaintiffs motion for temporary restraining order is granted to the extent that the defendants, severally and individually are restrained from distrubing [sic], disseminating and otherwise publishing the logs or airtels, or reports thereof, generated as a result of the electronic surveillance conducted at 168 Atwells Avenue, between March of 1962 and July of 1965, as they

relate to Raymond J. Patriarca. pending [sic] hearing at 10:00 a.m. on Friday, Nov 15, 1985

/s/ Francis J. Boyle
Chief Judge

Entered as an order of this court this 13th day of November 1985.

/s/ Robert R. Henry
Deputy Clerk

The Providence Journal

City Edition

© Providence Journal Co., Thursday, November 14, 1985 — Five Sections/84 Pages — 35 Cents; $1.70 per week by carrier

—Journal-Bulletin Photo by MICHAEL J.B. KELLY

THE PATRIARCA PAPERS: This July, 1978, photo shows FBI agents lugging boxes of transcripts of tapes recorded at the Providence office of crime figure Raymond L.S. Patriarca. His son, Raymond J. Patriarca, has filed a lawsuit attempting to block release of the tapes' contents.

Court restricts media use of FBI tapes on Patriarca; Journal decides to print

Son of reputed mob leader seeks to block excerpts concerning him

By PAUL DUGGAN
Journal-Bulletin Staff Writer

PROVIDENCE — A federal judge yesterday ordered the *Journal-Bulletin* not to publish information about mob leader Raymond J. "Junior" Patriarca obtained through illegal FBI surveillance. Citing the Constitution's guarantee of a free press, the newspaper today published an article despite the order.

The temporary restraining order signed by Chief Judge Francis J. Boyle of U.S. District Court also applies to WJAR-TV, Channel 10. A Channel 10 spokesman said yesterday that the station would comply.

Today's *Journal-Bulletin* story quotes from conversations between Patriarca and his father, Raymond L.S. Patriarca, the leader of organized crime in New England before his death last year.

The conversations took place between 1962 and 1965, while the FBI had an electronic eavesdropping device planted in the elder Patriarca's Federal Hill storefront. The *Journal-Bulletin*, after nine years of legal skirmishes, began obtaining summaries of the FBI's tape recordings earlier this year through the Freedom of Information Act.

★ ★ ★

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Patriarca, now 40, was 17 to 20

Turn to COURT, Page A-17

Patriarca Sr. to son: 'You only lie to cops and people you don't know'

By ROBERT KRAMER
Journal-Bulletin Staff Writer

The Patriarca tapes

First in a series

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When Raymond J. "Junior" Patriarca graduated from high school in 1962, he wanted to be a lawyer, a goal encouraged by his father.

At the time, the elder Patriarca was head of the New England crime family of La Cosa Nostra, a position he held until his death in 1984. He directed his criminal enterprises from his office on Atwells Avenue in Providence. From 1962 through 1965 the FBI had an electronic listening device in the office and recorded and transcribed hundreds of conversations between Patriarca and his henchmen and allies.

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RAYMOND L.S. PATRIARCA

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RAYMOND J. PATRIARCA

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Court

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Cicilline said he was "delighted" by Boyle's decision.

Matthew F. Medeiros, lawyer for the *Journal-Bulletin* and Channel 10, said he was "disappointed."

Charles McCorkle Hauser, vice president and executive editor of the *Journal-Bulletin*, said in a statement last night that the newspaper decided to print the story in spite of Boyle's order because the First Amendment to the Constitution "prohibits what is known as prior restraint—imposing censorship in advance of publication."

"We have the greatest respect for Judge Boyle, but in this case we are convinced that his order would impose a prior restraint in violation of the Constitution," Hauser said. "For that reason, we have decided to publish in Thursday's *Journal-Bulletin* our article about Raymond J. 'Junior' Patriarca, the first of a series of stories based on the Patriarca tapes."

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THE EAVESDROPPING generated more than 7,000 pages of typed transcripts, summaries and FBI appraisals of the information. *Journal-Bulletin* metropolitan managing editor Joel P. Rawson said the newspaper has received "the bulk" of the material from the FBI and had been expecting more.

But Boyle also temporarily barred the FBI from releasing more material without expunging references to the younger Patriarca, who allegedly succeeded his father as the leader of organized crime in New England.

Everett C. Sammartino, an assistant U.S. attorney, said the FBI would comply with the order, but that he would argue at tomorrow's hearing that it should be vacated.

Channel 10 aired a news story Nov. 6 based on Patriarca material it already has obtained from the FBI.

But Channel 10 news director David B. Baer said yesterday that the station would abide by Boyle's order. Baer said he was "glad" that Boyle limited his ruling to the younger Patriarca and did not prohibit the use of all information collected and released by the FBI.

• • •

LAWYERS in the case, emerging from a private, half-hour chambers conference with Boyle yesterday, said the judge based his order on his interpretation of a 1979 federal appeals court ruling that denied the *Journal-Bulletin* access to the Patriarca material.

The *Journal-Bulletin* originally requested the material under the Freedom of Information Act in 1976, but

FBI officials refused to provide it, saying the information act required them to weigh Patriarca's right to privacy against the public's right to know.

The law allows the government to withhold information when it decides that the public's interest does not outweigh an individual's right to privacy

At the time, the FBI said that releasing the material would contribute to an "unwarranted invasion" of the elder Patriarca's privacy.

The *Journal-Bulletin* appealed the FBI's decision to Judge Raymond J. Pettine of U.S. District Court, and Pettine ordered the agency to release the material. But Pettine's ruling was overturned in 1979 by the U.S. Circuit Court of Appeals in Boston.

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BUT LAWYERS for the *Journal-Bulletin* and Channel 10 said that in their view, the appeals court did not prohibit the release of the material. It simply ruled that the FBI had the option of withholding the material if it deemed that the elder Patriarca's right to privacy outweighed the public's interest.

Judge Boyle agreed yesterday with Cicilline's interpretation, according to lawyers for both sides.

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"I don't know what the process was by which the FBI and the Justice Department did a 180-degree turn," Cicilline said. "I would have thought that whenever this review process was going on, they would have notified (Cicilline and Patriarca) about it."

Even if Cicilline's interpretation of the appeals court ruling is incorrect, and even if the FBI did objectively consider his client's right to privacy, Cicilline said, the agency's decision to release the information was unjustified. He said that in this case his client's interests outweigh the public's right to know.

BUT MEDEIROS, lawyer for the *Journal-Bulletin* and Channel 10, argued that regardless of how the media obtained the material, they have a constitutional right to publish and broadcast it.

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The younger Patriarca, whose name has emerged in the current Boston trial of five alleged members of his father's crime family, has never been convicted of a crime. A charge of receiving stolen goods was dismissed in 1971 after two prosecution witnesses declined to testify.

In 1976, a participant in the 1975 Bond Vault heist, the largest robbery in Rhode Island history, said the younger Patriarca helped plan the holdup and was to get a share of the nearly $3 million in loot. But he was never charged in the case.

THE JOURNAL'S STATEMENT

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Tapes

Continued from Page One

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The boss of a Cosa Nostra crime family is chosen by "soldiers," the rank and file of the family, and then ratified by the Commission, the bosses of the most powerful Cosa Nostra families in the country. By the time Patriarca died in 1984, Junior had apparently overcome the objections of most family members and, according to the FBI, was elected to succeed his father.

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Sports
Red Sox send Ojeda to Mets
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City
Garbage truck kickback trial is postponed for one week
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The Evening Bulletin

122nd year, No. 221, 84 pages - 5 sections | PROVIDENCE, RHODE ISLAND, THURSDAY, NOVEMBER 14, 1985 | © 1985 The Providence Journal Co. 35¢/$1.70 per week by carrier

Today's late news

Victims of police spying awarded $306,250 total

CHICAGO — A federal judge today approved a $306,250 settlement for 20 groups and individuals who accused police of spying on church, anti-war and other organizations during the 1960s and 1970s. The judge agreed to hear arguments from five other plaintiffs seeking to test the constitutionality of the police actions. The tentative agreement approved by U.S. District Judge Susan Getzendanner will pay $20,625 to each of 10 organizations and $10,000 each to 10 individuals. The 25 individuals and civic groups sued the city in 1974, contending a Chicago police department unit systematically spied on and disrupted lawful activities of community, church, anti-war and civic groups. That unit, disbanded in 1975, was dubbed the Red Squad.

U.S., Italy join forces

WASHINGTON — Trying to bury recent disagreements over Italy's handling of the Achille Lauro ship hijacking, U.S. and Italian officials announced new joint efforts to combat international terrorism. Attorney General Edwin Meese and Italy's Interior Minister Oscar Luigi Scalfaro announced that terrorism would be included in the work of the Joint Italian-American Working Group to Combat Narcotics Trafficking and Organized Crime. Meese said the two nations are united

Court, Journal clash over use of tapes

Despite ruling on Patriarca suit newspaper decides to print excerpts from FBI recordings

By PAUL DUGGAN
and TRACY BRETON
Journal-Bulletin Staff Writers

PROVIDENCE — A federal judge yesterday ordered the *Journal-Bulletin* not to publish information about reputed mob leader Raymond J. "Junior" Patriarca obtained through illegal FBI surveillance. Citing the Constitution's guarantee of a free press, the newspaper today published an article despite the order.

The temporary restraining order signed by Chief Judge Francis J. Boyle of U.S. District Court also applies to WJAR-TV, Channel 10. A Channel 10 spokesman said yesterday that the station would comply.

John F. Cicilline, lawyer for Patriarca, said today he is "aghast" at the *Journal-Bulletin's* decision to defy a court order. He said he is considering taking further legal action against the newspaper.

Judge Boyle said he would not take any punitive action on his own.

Today's *Journal-Bulletin* story quotes from conversations between Patriarca and his father, Raymond L.S. Patriarca, the leader of organized crime in New England before his death last year.

The conversations took place between 1962 and 1965, while the FBI had an electronic eavesdropping device

See COURT, Page A-17

Fatherly advice from Patriarca Sr.

By ROBERT KRAMER
Journal-Bulletin Staff Writer

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The device also picked up conversations between Patriarca and his son.

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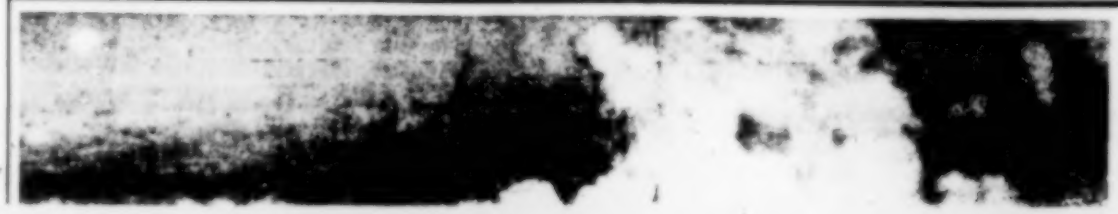
See TAPES, Page A-16



Big toll feared in Colombian eruption, flood

(p. A-17)

Court

Continued from Page One

planted in the elder Patriarca's Federal Hill storefront. The *Journal-Bulletin*, after nine years of legal skirmishes, began obtaining summaries of the FBI's tape recordings earlier this year through the Freedom of Information Act.

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CICILLINE sued the newspaper, Channel 10 and the Justice Department, charging that public "dissemination" of the FBI material would be an "unwarranted invasion" of his client's privacy. The lawsuit deals only with material pertaining to the younger Patriarca, not to his father.

Patriarca, now 40, was 17 to 20 years old at the time his father's office was under surveillance. The FBI, which has since conceded that the eavesdropping was illegal, destroyed the tapes after making transcripts and written summaries.

Boyle said his restraining order would remain in effect at least until a hearing tomorrow at which lawyers for the *Journal-Bulletin* and Channel 10 will ask him to vacate it and Cicilline will ask him to make it permanent.

Boyle said this morning he had no comment on the newspaper's defiance of his order. He said he did not plan to take action as a result of the newspaper story. Apparently, though, he would consider acting against the newspaper if Cicilline or another party to the suit asked him to.

"That's not up to me," Boyle said. "That is not part of the system, as I understand it. . . . I thought the system of justice involved an adversary system. The judge is not a party."

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CICILLINE SAID yesterday he was "delighted" by Boyle's decision. This morning, he said he criticized the newspaper for violating the court order.

"The Providence *Journal* has written editorials condemning teachers for defying court orders, and condemning people who refuse to answer qestions after they are given immunity before a grand jury," Cicilline said when reached at his law office. "The *Journal* has taken the righteous position that the law is the law. But when it serves their own ends, they do it differently."

"I think this is a clear indication of malice," he added.

Cicilline said his client, Patriarca, was "unavailable for comment" this morning, but might have a statement later in the day. He said he would also decide later in the day what action he would take as a result of the newspaper story.

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4

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FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA — CA 85-0707B

Plaintiff

v — 15 November 1985

FEDERAL BUREAU OF INVESTIGATION, et al — Providence, R.I.

Defendants

TRANSCRIPT OF DECISION
BEFORE CHIEF JUDGE FRANCIS J. BOYLE

APPEARANCES:

FOR THE PLAINTIFF: JOHN CICILLINE, ESQ.
165 Atwells Avenue
Providence, R.I., 02903

FOR THE DEFENDANTS: JOSEPH CAVANAGH, JR., ESQ.
MATT MEDEIROS, ESQ.
EVERETT SAMMARTINO, ESQ.

COURT REPORTER: ALFRED GALLUCCI
301 Federal Court
Providence, R.I. 02903

(p. 1) 15 NOVEMBER 1985

The Court: This action was filed in this court on November 8th, one week ago today, and seeks injunctive relief with respect to certain materials obtained by reason of a bug, so-called, being placed in the premises at Number 168 Atwells Avenue in the City of Providence, something more than twenty years ago, between the years 1962 and 1965.

The complaint is brought by Raymond J. Patriarca and, as I understand counsel's stipulation, relates only to that material which concerns Raymond J. Patriarca, and not any others involved in any conversations that may have been recorded as a result of the bug.

Sometime after the information was compiled by the FBI in the form of logs and airtels, the Providence Journal Company, a defendant in this action, sought to obtain the information from the FBI. The FBI refused at that time to provide the information, and the Providence Journal Company brought suit in this court. Judge Pettine filed two opinions with respect to that litigation and divided the material into three categories, Numbers 1, 2, 3, ordered the production of Category 2 material and ordered that materials falling into Categories 1 and 3 would be retained. In general, Category 1 material related to personal details of the life of Raymond L.S. Patriarca. (p. 2) Both parties, as I understand it, appealed to the Court of Appeals and the Court of Appeals reversed Judge Pettine with respect to the Category 2 material. Part of the battleground of this litigation is the meaning of and the implications that flow from the Court of Appeals decision in the case of Providence Journal Company v the FBI.

This action was precipitated by the fact that the plaintiff Raymond J. Patriarca apparently became aware

that the FBI at some time in the recent past had made available to the defendant Providence Journal Company and to WJAR Television 10, some of the material that related to the airtels and the logs of the 1962 through 1965 bugging. And it is contended that the Providence Journal Company published some of the information.

In this instance, although the materials had been furnished to the defendants, none of the parties have yet responded to the Court's demand that the materials be made available to the Court, nor had the materials been made available to the plaintiff. There is, therefore, something of the aura of mystery as to exactly what's in this material, a mystery which is not yet dispelled so far as the Court's concerned. I simply do not know what's in the material, and that makes it a little difficult for the Court to make a decision that some reasonable (p. 3) expectation is the correct decision under the circumstances.

There is no doubt that the First Amendment to the Constitution of the United States is a most significant aspect of our society and its operation. We have a free press which is certainly the freest in the world, and by reason of which society has benefitted without question. It's important that people be informed as to the affairs of their Government, the events that transpire in society, and the press has done this very effectively in this country. And so that they have done so because of the fact that there are no real limitations with respect to what may be considered an exercise of the First Amendment right of freedom of the press. And the rule is well established that there shall be no prior restraint of a free exercise of the press rights conferred by the First Amendment.

The issue at this point is, it seems to me, on continuation of the restraining order, whether or not the plaintiff has presented issues which on proper reflection might very well be found to have merit. It is not a matter of my determining the ultimate question at this point, but whether or not there is sufficient reason to defer until such time as the Court has had a realistic opportunity to consider what seems to be the rather unique issues raised by this litigation.

(p. 4) There appears to be a basis for arguing that there is here represented a clash between two fundamental rights, first, the right of a free press that is conferred by the First Amendment, in unequivocal terms, that Congress shall not abridge, freedom of the press; and the second in equally unequivocal terms, that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated. A simple application of the English language demonstrates that both of these are in commandment forms, and that they are unqualified. We are aware that in applying the Constitution 200 years after it's written, that sometimes the words that are written do not come out exactly as they are written, and that there has to be a workable scheme established that takes into consideration all aspects of the Bill of Rights, and gives meaning and effect to each of the provisions of the Bills of Right.

This case raises, it seems to me, a rather fundamental issue of whether the Government can, at will, violate an individual's Fifth Amendment rights, and leave the individual with no remedy available, should the Government turn the information over to an individual who would publish it or to a newspaper or television station who would

publish it. And it seems to me that before this substantial infringement on the rights of individuals is condoned, that some more (p. 5) study ought to be given to the problem. It merits that study.

Now, it seems to me there is something to the argument that an injunction at this point is not a prior restraint, that there is something to the suggestion that the Court of Appeals has already limited the defendant, Providence Journal Company, at least, with respect to the materials which it may publish, in the FBI's refusal to honor the request and the Court of Appeals approval of that refusal.

I'm also faced with the problem here of the effect of not deterring publication at this point, with the result that the information is published and the action is moot. The Court of Appeals of the First Circuit was very much concerned with that issue the first time that this issue went there, and stayed Judge Pettine's order for the duration of time that the matter was pending on appeal. The Court of Appeals pointed out, and I think quite correctly, that at 595 F.2d 890: "Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court, before it becomes irrevocable. Appellants' right of appeal here will become moot unless the stay is continued pending determination of the appeals. Once the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time. The status quo could never be restored.

"Appellants are not, of course, entitled to a stay (p. 6) pending appeal wifhout showing that their appeals have potential merit. We believe that they have made a

sufficient showing on this score. Where, as here, the denial of a stay will utterly destroy the status quo, irreparably harming appellants but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay." I might here observe that we are here concerned with statements uttered between the years 1962 and 1965, and that there are some who consider that anything that happened more than ten years ago is history; that certainly a short delay in the publication of this material is not going to be a substantial harm to anyone, particularly where the competing interests are such as are here.

The Supreme Court has suggested that courts may indeed stay publication for short periods of time. In Southeastern Promotions, Ltd. v. Steve Conrad, 420 US 546, at 560, the court said this in part: "We held in Freedman, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt (p. 7) final judicial determination must be assured."

The contentions of the plaintiffs here find some support it seems to me in the New York Times case, the so-called Pentagon Papers case, at 403 US 713, Footnote Number 1, there the court said this: "The Congress has authorized a strain of prior restraints against private parties in certain instances. The National Labor Rela-

tions Board routinely issues cease and desist orders against employers who it finds have threatened or coerced employees in the exercise of protected rights. Citing the statute. Similarly the Federal Trade Commission is empowered to impose cease and desist orders against unfair methods of competition. Citing the statute. Such orders can, and quite often do, restrict what may be spoken or written under certain circumstances. Citing NLRB v Gissel Packing. Article 1, Section 8 of the Constitution authorizes Congress to secure the 'exclusive right' of authors to their writings, and no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another. Citing Westermann Co. v Dispatch Co. Newspapers do themselves rely from time to time on the copyright as a means of protecting their accounts of important events. However, those enjoined under the statutes relating to the National Labor Relations Board and the Federal Trade Commission are private parties, not the press; and when (p. 8) the press is enjoined under the copyright laws, the complainant is a private copyright holder enforcing a private right. These situations are quite distinct from the Government's request for an injunction against publishing information about the affairs of government, a request admittedly not based on any statute."

Here, the request is purportedly based on the statute and also finds some support, at least, in the Bill of Rights itself.

Under the circumstances, the Court will continue the restraining order, and I am prepared to hear this matter on preliminary injunction on next Tuesday morning at 10 o'clock, if counsel can be prepared to do it at that time.

I would appreciate having any law that can help us on this point as soon as possible. Can you be ready next Tuesday?

Mr. Cicilline: I can be ready. I'm not certain whether Judge Kiely will let me come over.

The Court: We'll do it at night, all right?

Mr. Cicilline: I'm sorry?

The Court: We'll do it at night.

Mr. Cicilline: I'm scheduled to impanel a jury on Monday morning in a case they tell me will run about two weeks. I will make efforts with Judge Kiely.

The Court: All right. Well, if you could talk with him and see if you can be available. I don't know as it (p. 9) will take us much time because I would want to hear only something new. I don't want to go through the whole business all over again.

Mr. Cavanagh: Your Honor, to just move this along, my suggestion would be that you enter a preliminary injunction today, and set it down for permanent injunction.

The Court: I may not be prepared to enter a preliminary injunction. Now, I understand what your problem is at this point, if you have a restraining order you have some difficulties with an appeal.

Mr. Cavanagh: That's right.

The Court: And I certainly want to see you get the opportunity to take an appeal just as soon as possible, but I do think I'm entitled to have a little more time to think about this problem, and a little more help from counsel.

Mr. Cavanagh: Well, as a practical matter, if a preliminary injunction is termed preliminary, but in fact a

preliminary injunction hearing is set at a time that gives you adequate time to decide it and gives us adequate time to brief it, I don't see where it makes any difference. The injunction is the same. The only problem for us is that we would like to bring this to another court. We're prevented from doing it because of the description as either temporary or preliminary. It doesn't make much sense, I (p. 10) respectfully suggest, and if you'd like us to have that opportunity to be heard, I ask you that you enter it preliminarily with the idea that it really is a short term injunction because you're going to hear it on permanent, if the First Circuit doesn't hear us.

The Court: It doesn't make any difference to me except that there aren't enough findings in the record, it seems to me, at this point.

Mr. Sammartino: Respectfully, Your Honor, there is a body of cases which state that once the Court submits it for hearing, it thereby becomes a preliminary injunction. I was under the impression that's what we were here for today.

The Court: Well, you didn't hear what I said a little bit earlier this morning.

Mr. Sammartino: Well, I know what the Court said.

The Court: I was hearing it on an order to show cause whether the restraining order should be continued. I thought I had made that clear.

Mr. Sammartino: Once the Court grants the temporary restraining order ex parte, as it did in chambers, and puts it down for hearing, the cases state it immediately goes into preliminary injunction status, and this is important relative to our rights of appeal. I just state that on the record, your Honor.

(p. 11) Mr. Cavanagh: Your Honor, again what we would ask for is whatever you enter today be—

The Court: Well, I don't want to hold you up, but I think in fairness to this Court, that we ought to have some time to think about it. I'm not prepared to say that I'm going to enter a preliminary injunction at this point. I'm not satisfied one way or the other. I am satisfied that if an order isn't in effect, that this matter could be completely moot in fairly short order, and that at least we ought to have a little bit of time to think about the issues.

Mr. Cavanagh: The problem for us is that the more we think about it, it stated on Wednesday, and we're now going to go to Tuesday, the First Amendment rights from our point of view are being harmed, and—

The Court: I understand that.

Mr. Cavanagh: —in a way it is almost unprecedented, and what I'm suggesting is that if you want more time, well if the injunction is described as preliminary, that at least gives us the right to go to the First Circuit, and they can consider the matter, they can dispose of it at that time, they can send it back, but at least we can seek immediate review.

The Court: Well, I wish you had raised this question earlier today. My frame of mind might have been a little (p. 12) different in terms of what I was actually hearing.

Mr. Cavanagh: The effect of what you're doing now, it is very important, and it is like a preliminary injunction.

The Court: I'm also prepared to hear this next Tuesday. Now that's pretty good service, I think, and that's

what I'm prepared to do. You can have an exception, if that's going to do you any good.

Now, there is a motion here to cite one of the defendants in contempt. What do you want to do with that?

Mr. Cicilline: I received no answer to it, and as I understand the defendant's position is that they want an opportunity to respond in writing.

Mr. Medeiros: Your Honor, our position is that under Local Rule 12, we're entitled to ten days to file any objection, memorandum—

The Court: All right, then I must say that I would appreciate it if you would look at some cases, particularly the United Mine Workers case, and see if you can come to some agreement as to whether the motion raises questions involving civil contempt, or criminal contempt, and I understand there was a stipulation that I saw someplace this morning that both of you agreed that it was civil contempt. I must say that I'm not prepared to enter that stipulation at this point in time, because if you look at the case law, you may very well come to the conclusion that the motion (p. 13) raises questions of criminal contempt rather than civil contempt. Now, if that's the case, then we're involved with Rule 42, I think it's 42, which requires notice and a hearing. 42 also provides that a party charged with criminal contempt, has a right to a jury trial if certain statutes require it. I must say I don't know of any statutes that require it in this instance but there may be. I'm going to ask counsel to take a look at that and see what it looks like. Mr. Cicilline, you prepare and present a form of order.

Mr. Cicilline: I will, your Honor.

The Court: Anything further?

Mr. Cavanagh: Your Honor, with respect to the hearing scheduled for Tuesday, we'll provide you with any additional information you would like, in addition to a brief and further cases, is there anything else you have in mind?

The Court: The problem that, from your point of view, what I'm really interested in is this interaction of the Fourth and the Fifth Amendment, if you can give me anything further on that. There's a lot of law that may be close to some of the problems we have, and I do think a little bit more time might sharpen this up a little better. For instance, it may be if I decide on Tuesday to deny a preliminary injunction, you don't have to worry about an appeal, and then we don't bother the Court of Appeals, which (p. 14) is something they might be grateful for. From the plaintiff's point of view, what I'm interested in is this contention that the court's involvement is an exercise in futility, that we are trying to hold back the tide, and do not have the resources to accomplish it, because as more time goes by, it may be that that argument takes on more vitality.

Mr. Cicilline: It is my understanding at this point that the Justice Department is not further distributing the logs and airtels, and it would seem to me that whatever has already been distributed has probably already been published.

The Court: That we don't know. And I suspect nobody is going to tell us that, either.

Mr. Cicilline: I bring that up in connection with my complaint, the original prayer requests that we be fur-

nished with copies. So long as the Court has been assured that it can receive them within a week, may the order enter allowing us to obtain copies of the same?

The Court: Is the Government prepared to give to the plaintiff a copy of these things?

Mr. Sammartino: Formal request has been made under the FOIA and it's being processed.

The Court: And how long is this process going to take?

Mr. Sammartino: One moment, your Honor.

(p. 15) (Pause)

The Court: Sixty days? Let me just cut this short by saying that I expect the Government will make every effort to get to me and to Mr. Cicilline copies of the documents that they made available to the defendants in this action, before next Tuesday.

Mr. Sammartino: Made available to the plaintiff.

The Court: I didn't mean to make you speechless.

Mr. Sammartino: I'm sorry. I thought you said to the defendants.

The Court: To the plaintiff. I misspoke perhaps because Mr. Cicilline is usually on the other side. I don't usually see him sitting on that side. This is a collecting process. This is not now a matter of editing. This is simply collecting what you gave to somebody else, making another copy of it and getting it to us.

Mr. Sammartino: Thank you, your Honor.

The Court: I should like to see it before next Tuesday. It would help me very much in finding out precisely what I'm deciding.

Mr. Sammartino: We'll do our best to have it for Tuesday your Honor.

The Court: Pardon me?

Mr. Sammartino: We'll do our best to have it for Tuesday.

The Court: Well, I'm sure you can succeed. Is there (p. 16) anything further?

Mr. Cavanagh: Your Honor, for the record, I would ask a stay of the order you're entering today until the appeal to the First Circuit.

The Court: Well, your request is denied, and you can see what you can do with that. If there is any way that I can help you to get up there, I will do it, I assure you, but I think we need some time to study this problem. Anything further? The Court will be in recess.

(Court Reporter's Certification Omitted)

5

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA, Individually and as Administrator of the Estate of Raymond L.S. Patriarca	CA 85-0707B
Plaintiff	
v	
FEDERAL BUREAU OF INVESTIGATION, ET AL	Providence, R.I. 19 November 1985
Defendants	

TRANSCRIPT OF HEARING
BEFORE CHIEF JUDGE FRANCIS J. BOYLE

APPEARANCES:

FOR THE PLAINTIFF: JOHN CICILLINE, ESQ.
165 Atwells Ave.
Providence, R.I., 02903

FOR THE DEFENDANTS: MATT MEDEIROS, ESQ.
JOE CAVANAGH, ESQ.
EVERETT SAMMARTINO, ESQ.

Court Reporter: ALFRED GALLUCCI
301 Federal Courthouse
Providence, R.I., 02903

(p. 1) 19 NOVEMBER 1985

The Court: This action was filed in this court on November 8, 1985, at 5:40 p.m., and following a conference in chambers on November 13, 1985, a restraining order was entered to the extent that the defendants severally and individually are restrained from distributing, disseminating and otherwise publishing the logs or airtels or reports thereof generated as a result of the electronic surveillance conducted at 168 Atwells Avenue, between March of 1962 and July of 1965, as they relate to Raymond J. Patriarca, pending hearing at 10:00 a.m. on Friday, November 15, 1985. At that time the Court heard the parties on the record and on the basis of a show cause order directed to the defendants to show cause why the restraining order should not be continued. At that time, the Court, after hearing, continued the restraining order for hearing on preliminary injunction today.

Normally, a preliminary injunction is heard only after filing of an answer, but I take it that the parties are not in disagreement with respect to this procedure at this time.

Additionally, because of the constitutional issues that are involved here, and the admonitions of the United States Supreme Court, where restraint relates to publication, (p. 2) distribution of information, that the Court may only defer for a short period of time before making a decision with respect to the question of the right to publish. That, the Court has done in this instance. A restraining order was issued to maintain the status quo, which is perfectly appropriate for purposes of a restraining order, until the Court had some time to consider the rather unique and, to say the least, interesting and further crucial issues that are involved in this case.

This issue has been described as recently as two weeks ago in an address by Arthur Miller of Harvard Law School, at the First Circuit conference as being the imminent constitutional clash that is facing the Supreme Court at this point in time, that is, the relationship between the Fourth Amendment right of privacy, and the First Amendment right of publication. I won't deliver Professor Miller's address to you. It took about an hour. But, in any event, there is some thinking at least in academic circles that this specific issue is a matter of real concern, and I'm satisfied it's a matter of real concern. It's a matter that ought to have available to it the ordinary course of study that decisions of this court are submitted to, that is, in normal circumstances the Court at this point would reserve decision and spend two months writing an opinion, (p 3) which would probably be not quite as disjointed as the Court's opinion might be this morning from the bench.

In any event, the parties are entitled to a prompt decision on the issue, and I intend to give the best that I

can under the circumstances, having in mind that this is an important question.

The evidence is not substantially disputed, and much of it is found in the Court of Appeals decision in the First Circuit in the action of the Providence Journal Company v the Federal Bureau of Investigation, in which the Court of Appeals, as I read that decision, held that the policy expressed by the Congress in the Freedom of Information Act, with respect to privacy materials, would be applied, even though the interception here was prior to the time that the act became effective, that is, as I read Judge Coffin's opinion, it expresses the principle that Congress has stated what has always been the principle and that therefore the expression of it, the subsequent expression of it, does not change the fact that privacy rights of individuals are going to be respected, and so as I read his opinion, it is that the privacy rights of Raymond L.S. Patriarca, which were implicated, should not be violated by publication of material that was involved in that case, and which is apparently the same materials (p. 4) involved in this case.

Additionally, there is evidence before this Court that all of the material in the possession of the Government has not yet been disclosed to members of the public, including the press, so that some material remains in the Government's possession. The further evidence is that some publication has already taken place with respect to Raymond J. Patriarca, arising out of the documents furnished by the Government by entities which were not involved in the restraining order that was issued and the restraining order that's in effect at this point in time.

Although the complaint appears to be broadly involving materials concerning Raymond J. Patriarca and Raymond L.S. Patriarca, it is stipulated that the thrust of this action relates to information, statements to, by Raymond J. Patriarca only.

The complaint alleges, and it is not seriously disputed, that this information—and it's stipulated, that the information obtained by the Government was obtained illegally in violation of the Fourth Amendment to the Constitution of the United States. The information at this time consists of logs and airtels prepared by FBI agents who conducted the surveillance, the original tapes having been reused and therefore the original recordings having (p. 5) been destroyed in the process. In this connection the Government has furnished this morning to the Court and to the plaintiff, copies of the materials which have been delivered to the Providence Journal Company.

The Court has been aided in its efforts by two Law Review articles which bear generally on the subject at hand, one First Amendment standards for subsequent punishment of dissemination of confidential government information which is found at 68 California Law Review beginning at Page 83, and the other Incursions on Access: "Privacy" versus the First Amendment, which appears in Volume 15 of the Toledo Law Review, beginning at Page 641.

There is no decision of the United States Supreme Court which specifically relates to this issue, that is, none has been found by counsel, nor has the Court been able to find one, which this specific issue is dealt with.

One of the requirements of a preliminary injunction is that the party seeking the injunction establish a likeli-

hood of success. That likelihood of success has been described by the Court of Appeals in the First Circuit in Auburn News v the Providence Journal, as one that looms large in terms of whether or not preliminary injunction should be granted. And it is that aspect of it that I will address. Again, there are no Supreme Court cases which decide this issue. (p. 6) There are, however, some straws in the wind, which is the only source available to this Court at this time in predicting what the United States Supreme Court might do with this question when, as and if it does decide it. That is my task this morning, and it is one that is certainly not 100 percent accurate, but based on prior decisions of the Supreme Court, it may be possible to make a prediction as to what the Supreme Court would do with this issue if faced with it.

The two, it seems to me, most significant authorities suggesting which way the wind is blowing in this area, the case decided in 1975, Cox Broadcasting Company v Cohen [sic], and which is reported in 420 U.S., beginning at Page 469, and Landmark Communications, Incorporated v Virginia, a case that is a 1977 case, reported at 435 U.S., beginning at Page 829.

In Cox, the State of Georgia, by statute, made it a misdemeanor to broadcast a rape victim's name, and the defendant Cox Broadcasting Company's reporter obtained the name of the rape victim from the indictment, which was a public document, and published the name, and as a result, the victim's father brought an action based on the Georgia statute making it a misdemeanor to broadcast that person's (p. 7) and in this case the Supreme Court reached out, really, to decide the question, because there's some procedural matters that happened in the Georgia

Supreme Court which I'm not going to go into, but in any event, in that case, the Supreme Court held the State may not, consistently with the First and Fourteenth Amendments, impose sanctions on the accurate publication of a rape victim's name obtained from judicial records that are maintained in connection with a public prosecution and that themselves are open to public inspection. In the course of that opinion, the court discussed the right of privacy at some length.

The right of privacy probably derives from a law review article that was published in 1890 by the Harvard Law Review written by Professors Warren and Brandeis. Interestingly enough, the occasion upon which the law review article was written was that Mrs. Warren was quite upset with the Boston press because of the way the Boston press was covering her parties that she had given, and so her husband, later to be a Justice of the Supreme Court, wrote a law review article entitled The Right to Privacy, 4 Harvard Law Review 193. Having in mind the premise upon which this was written, some of the language is of some interest. In part it says this: "The intensity and complexity of life attendant upon advancing civilization—(p. 8) this is written in 1890, something a little less than 100 years ago—have rendered necessary some retreat from the world and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual, but modern enterprise and invention have through invasions upon his privacy, subjected him to mental pain and distress far greater than could be inflicted by mere bodily injury, nor is the harm brought by such invasion confined to the sufferings of those who may be made the subjects

of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip thus harvested becomes a seed of more, and in direct proportion to its circulation results in a lowering of social standards and of morality. Even gossip apparently harmless when widely and persistently circulated is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus warping the thoughts and aspirations of a people. When personal gossip attains the dignity of print and crowds the space available, matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance, ease of comprehension appealing to that weak side of human nature, which is never wholly cast down by (p. 9) the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest, it embranes, capable of other things. Triviality destroys it once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

It would seem to be pretty clear in light of that language that it was written in the 1890s. Thus the right of privacy. It had been recognized at common law in most states. The history of that right in this state has been somewhat checkered. There is, as I recall, one case, Cherry and Webb, which denies the existence of a common law right of privacy, but more of that later.

In Cox, the Court said: "There are impressive credentials for a right of privacy—this is at Page 489—but we should recognize that we do not have at issue here an action for the invasion of privacy involving the appropriation of one's name or photograph, a physical or other

tangible intrusion into a private area, or a publication of otherwise private information that is also false although perhaps not defamatory. Because the gravamen of the claimed injury the publication of information, whether true or not, disseminates (p. 10) of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press. The face-off is apparent, and the appellants urge upon us the broad holding that the press may not be made criminally or civilly liable for publishing information that is neither false nor misleading but absolutely accurate, however damaging it may be to reputation or individual sensibilities.

In sum, what the Court did in Cox was to hold the statute unconstitutional, in violation of the First Amendment. Thus, we do get some weighing of free speech and privacy rights, although without a decision on that specific point.

The second case is Landmark Communications v Virginia, in which a newspaper published items that were confidential in a jury inquiry and review commission proceeding, and the court says at 435 U.S. 837: "The narrow and limited question presented, then, is whether the First Amendment permi [sic] the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission. We are not here concerned with the (p. 11) possible application of the statute to one who secures the information by illegal means and thereafter divulges it. We do not have before us any constitutional challenge to a state's power to keep the commission's

proceeding confidential or to punish participants for breach of this mandate."

After discussion of New York Times v Sullivan, the Virginia State Board of Pharmacy v Virginia Citizens and Lindmark [sic] Associates v Willenborough [sic], the court says this: "We conclude that the publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the commonwealth's interest advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachment on freedom of speech and of the press which followed therefrom. Citing Buckley v Valeo."

Going on Page 839: "The Commonwealth concedes that without question the First Amendment seeks to protect the freedom of the press to report and to criticize judicial conduct." And so on. "As we read Cox, it does not provide the answer to the question now confronting us. Our holding there was that a civil action against a television station for breach of privacy could not be maintained consistently with the First Amendment when the station had broadcast only (p. 12) information which was already in the public domain. The broader question—whether the publication of truthful information withheld by law from the public domain is similarly privileged—was not reached and indeed was explicitly reserved in Cox. We need not address all the implications of that question here, but only whether in the circumstances of this case Landmark's publication is protected by the First Amendment."

Going on to Page 841: "It can be assumed for purposes of decision that confidentiality of Commission proceedings serves legitimate state interests. The question, however, is whether these interests are sufficient to justify

the encroachment on First Amendment guarantees which the imposition of criminal sanctions entails with respect to nonparticipants such as Landmark."

The court went on to say that in substance, the standard upon which such information may be retained is the clear and present danger standard, that the danger must not be remote or even probable. It must immediately imperil. That at Page 845.

It seems to me one can draw from those two cases, at least, the inference that when faced with the issue of whether or not the absolute prohibition of the Fourth Amendment and balance applied to the First, would limit (p. 13) an exercise of the First Amendment right, that the Supreme Court is likely to determine that that would not occur. It is likely that the Fourth Amendment prohibition would yield to the First, in the circumstances.

Since one of the requirements is that the plaintiff show a likelihood of success, that it seems to me that the likelihood is just the opposite at this point in time, that it is likely that the plaintiff would not succeed on the Fourth Amendment privacy issue.

There are other issues in this case. With respect to the news organizations, there is a contention that under Title 3, the defendants are liable. Let me say that Title 3 in the first place relates only to an action for damages. This is 18 USC 2520 et seq. Secondly, it relates to interceptions which occurred on or after June 19, 1968. It is agreed in this instance that interceptions occurred prior to that date.

In Zerilli v the Evening News Association, the District of Columbia Circuit, decided in 1980, reported at 628 F.2d

217, the Court of Appeals for the D.C. Circuit decided, and I think correctly, that Congress intended only to apply Title 3 to actions arising from communications which are in violation of that law, and that since the communications here occurred prior to 1968, that Title 3 does not apply. In any event, it doesn't help the plaintiff with respect (p. 14) to his injunctive claim. Congress has limited the remedy to one of damages, and certainly Congress knew how to provide for an injunction, if that's what Congress had in mind under this act.

Additionally, the court in Zerilli discusses the Bivens doctrine, and limits that to federal officials, holds that a newspaper, in this case the Detroit Free Press, could not be held liable under Bivens, and does state in some dicta, at Page 223: "Assuming without deciding that private parties may in some circumstances be held liable under Bivens for conspiring with federal officials, we believe there are three special factors that, taken together, preclude us from imposing such liability in the present case." I'm not sure I agree with what follows thereafter, with respect to the central thrust of the Fourth Amendment. On that subject, the exclusionary rule that we all know so well is just a part of the Fourth Amendment rights that are involved. The exclusionary rule grew up from a kind of dilemma that the courts faced in terms of whether or not a defendant who is presumed—constitutionally presumed to be innocent, may be found guilty on the basis of evidence which the Government obtained illegally. The alternatives that were suggested were a damages action against the police officials involved, or (p. 15) exclusion of the offered evidence, and the purpose of exclusion or

damages being to discourage police officials from violating the constitutional rights of people who were involved in or suspected of crimes. The rationale of the exclusionary rule, it does not seem to me, applies at all to this situation. Here, we're dealing with a situation in which the Government admittedly has illegally obtained certain information and then proceeds knowing it to be illegal, then proceeds to disseminate it. The Government certainly is the last entity in our society that one could expect not able to respond in damages for an action brought against it. Indeed, if the Government is insolvent, we are all in great difficulty. So that the kind of rationale that supports the exclusionary rule doesn't really apply in an instance in which the Government's involved as a defendant.

There are other rights which are involved here, which really haven't been mentioned. To begin with, the right of privacy is a matter generally of state law, and Rhode Island does have a statute which guarantees the right of privacy. That statute is Section 9-1-28.1, adopted by the General Assembly in 1980, and it may be that this statute applies to these circumstances. The statute says it is the policy of this state that every person in this (p. 16) state shall have the right to privacy, which shall be defined to include any one of the following rights individually: 3. The right to be secure from unreasonable publicity given to one's private life, (a) in order to recover for a violation of this right it must be established that (1) there has been some publication of a private fact; (2) the fact which has been made public must be one which would be offensive or objectionable to a reasonable man of ordinary sensibilities; (b) the fact which has been disclosed need not be of any benefit to the discloser of such fact.

Now, that's a pretty broad remedy. That section goes on to provide for relief in an action at law, suit in equity or any other appropriate proceeding, however, since this section specifically requires publication before the action can be brought, it seems to me that the concept of enjoining publication is excluded by the statute itself. So that it doesn't seem to me that an injunction can be predicated on the basis of the statute, but it does seem to me that very clearly under state law, and on a broad base, unreasonable publicity given to one's private life, is now the subject of recovering damages in the State of Rhode Island. However, I do not find this to be a basis for injunctive relief at this point in time.

(p. 17) In sum, with respect to the action against the defendants Providence Journal and WJAR Television 10, I am satisfied that it is more likely than not that the Supreme Court would hold that an injunction does not lie under the Fourth Amendment to the United States Constitution. What other remedies might be available, I think the injunctive remedy in these circumstances is probably not available. This is only a prediction. It is not a determination, a final one. This is for preliminary injunction only.

It seems to me that if there isn't, there certainly ought to be a damages action against the Government under Bivens for the publication of information that is illegally obtained, in violation of the Fourth Amendment. Even though there are no authorities for this proposition, the law has to make some sense, and to have a Fourth Amendment right which could be violated at liberty by the Government, and without any redress, would seem to be a somewhat ridiculous situation, that people, citizens,

have no protection from a Government which decides to make the most serious intrusion upon the privacy of life, and to publish that detail ought to be in some fashion responsible for what it does. I am satisfied that even though there are no cases, that there is a probability of success with respect to the question of whether or not a plaintiff (p. 18) in these circumstances may enjoin any further distribution by his Government, of information concerning him, which was obtained from him illegally. There are no cases. There is no case law in this area, but it seems to me it's simply a matter of common sense, that that information should not be distributed, at least until a hearing on the merits. I frankly can find no interest to the Government that's involved or implicated in distributing that information at this point in time, that might overcome the interest of the plaintiff in this case, in maintaining Fourth Amendment rights.

The Court will vacate the restraining order previously entered, deny the preliminary injunction with respect to the defendants, the Providence Journal Company and WJAR Television 10, and grant the injunction with respect to the Federal Bureau of Investigation and the United States Department of Justice. All parties may have an exception. That injunction is prospective only. Now what's this?

Mr. Cicilline: It's an order.

(Handed to the Court)

The Court: Mr. Sammartino, have you got a copy of this.

Mr. Sammartino: Yes, I do. If the Court please, we move at this time that the memorandum filed by the Government be made a part of the record.

(p. 19) The Court: It may.

Mr. Sammartino: In this case.

The Court: Certainly. How about this order?

Mr. Cavanagh: Your Honor, the final line of the order as they relate to Raymond J. Patriarca, what I'd like to ask the—

The Court: You're not even interested in this, are you? This isn't your problem at all.

Mr. Cavanagh: Well, if we're not able to get this information—

The Court: Well, I don't know if you're asking for it. Or what you're asking for. And you're not restrained.

Mr. Cavanagh: Okay, so I can't ask you this question.

The Court: I know what the question is that you're going to ask, but it doesn't seem to me you're involved in it. I have a situation here where the First Circuit has already held, as I read it, that there are privacy interests indicated in these documents. What do you want? You want to know what as they relate to Raymond J. Patriarca means.

Mr. Sammartino: Correct.

The Court: Well, Mr. Cicilline.

Mr. Cicilline: Everett wants to know what I mean by as they relate to Raymond J. Patriarca? Any log or

airtel that involves a discussion between Raymond L. S. Patriarca (p. 20) and Raymond J. Patriarca.

The Court: I don't think they're listening at this point, and it may be important that they hear it. Do you want to finish that conference and then—

Mr. Sammartino: I'm sorry, your Honor.

The Court: You were saying any record of a discussion.

Mr. Cicilline: Between the father and the son, or by the father about the son.

Mr. Sammartino: Basic objection I have to the order, your Honor, is that I believe it should read—although I object to it generally, of course, that as they relate to Raymond J. Patriarca, in conversation in which he participated.

The Court: Well, I haven't had a chance to read the material at this point, but let us suppose that there is a circumstance in which A says something about Raymond J. Patriarca, do you think that that can be disclosed?

Mr. Sammartino: Under the circumstances, he not being on the premises, I can't see how it could relate to an invasion of his privacy.

The Court: Well, of course, I can't, either, without looking at the precise statement.

Mr. Sammartino: A statement per se made about an individual doesn't necessarily invade their privacy.

(p. 21) The Court: That's exactly my point.

Mr. Sammartino: That's what I'm saying. I'm saying, in other words, if Raymond J. Patriarca was on the

premises talking, et cetera, he has no expectation of privacy.

The Court: Let me say that as—I gather this means to statements made to, by or about, is that right?

Mr. Cicilline: Yes, your Honor.

The Court: And if the Government has any problem with that, you can let me know.

Mr. Sammartino: We do have a problem with it, your Honor. I believe it only should state as to cases in which Raymond J. Patriarca was a participant.

The Court: All right. Then if you have documents that are like that, I'll take a look at them. Now it seems to me also that this order ought to read they are hereby preliminarily enjoined from further distributing, disseminating and so on. And this relates only to the defendants FBI and the Department of Justice. All right, I have entered the order. Are you going to get me an order, Mr. Cavanagh?

Mr. Cavanagh: Please, your Honor?

The Court: Are you gong to get me an order denying the preliminary injunction?

Mr. Cavanagh: Yes, we'll present one to you.

The Court: Anything further?

Mr. Cicilline: No, your Honor.

The Court: All right, the Court will be in recess.

(Court Reporter's Certification Omitted)

6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA	)	
	)	
	)	C.A. No.
vs.	)	85-0707 B
	)	
FEDERAL BUREAU OF INVESTIGATION, ET AL	)	

ORDER

In the above-captioned matter, it is hereby ordered that the temporary restraining order, dated November 13, 1985, a copy of which is attached hereto, is vacated with respect to defendants Providence Journal Company and WJAR-TV Television Ten, Inc.

ENTERED as an Order of this Court on the ..... day of November, 1985.

By Order:
Carol A. Boday
Deputy Clerk
12/13/85

ENTER:

Francis J. Boyle
Chief Judge, Boyle, J.
Dec. 13, 1985

7a

THE PROVIDENCE JOURNAL-BULLETIN
75 Fountain Street, Providence, R.I. 02902

September 26, 1984

Freedom of Information Unit
Federal Bureau of Investigation
Boston, Mass.

Dear Sirs:

I hereby request copies of or access to transcripts and summaries—and any tapes extant—of conversations recorded at the Atwells Avenue office of Raymond L. S. Patriarca in Providence, R.I. during the period March 6, 1962 through July 12, 1965 and any other dates for which such conversations were monitored.

As you know, Patriarca died in July of this year.

Very Truly Yours,

/s/ Robert Kramer
Robert Kramer
Reporter
Providence Journal
75 Fountain St.
Providence, R.I. 02902

7b

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Investigation
617-742-5533 X 247

In Reply, Please Refer to File No.

John F. Kennedy Federal Building
Government Center
Boston, Massachusetts 02203
October 9, 1984

Robert Kramer
The Providence Journal-Bulletin
75 Fountain Street
Providence, Rhode Island 02902

Dear Mr. Kramer:

This acknowledges receipt of your Freedom of Information request dated September 26, 1984 for access to tapes of conversations recorded at the office of Raymond L. S. Patriarca.

Please be advised that your request will be processed as soon as possible and you will be advised of the results.

Very truly yours,

JAMES W. GREENLEAF
Special Agent in Charge

By: /s/ Roger J. Corke
ROGER J. CORKE
Principal Legal Advisor

7c

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Investigation

In Reply, Please Refer to File No.

John F. Kennedy Federal Building
Government Center
Boston, Massachusetts 02203

December 5, 1984

Robert Kramer
The Providence Journal-Bulletin
75 Fountain Street
Providence, Rhode Island 02902

Dear Mr. Kramer:

This is in further response to your Freedom of Information Act request for access to transcripts and summaries of conversations recorded at the Atwell Avenue office of Raymond Patriarca.

After consulting with FBI Headquarters your request is being forwarded to Headquarters for processing and they will correspond directly with you concerning the possible release of any information.

Very truly yours,

JAMES W. GREENLEAF
Special Agent in Charge

By: /s/ Edward W. Ludemann
EDWARD W. LUDEMANN
Assistant Special Agent in Charge

7d

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Investigation

Washington, D.C. 20535

Jan. 16, 1985

Mr. Robert Kramer
The Providence Journal-Bulletin
75 Fountain Street
Providence, Rhode Island 02902

Dear Mr. Kramer:

Your recent Freedom of Information Act (FOIA) request to our Boston Office for access to transcripts and summaries of conversations recorded at the Atwells Avenue office of Raymond Patriarca, was referred to FBI Headquarters for handling.

Following a preliminary review of documents pertaining to your request, it is estimated that duplication costs of approximately $700 may result, representing a charge of 10¢ per page. Department of Justice regulations (Title

28, Code of Federal Regulations, Sections 16.10 and 16.46) require notification to a requester when anticipated charges exceed $25. This letter constitutes such notification.

Accordingly, before taking action, we will await receipt of written notification indicating your willingness to pay fees of approximately $700 in connection with the processing of your request. If you want to reduce the scope of your request to meet your needs at a lower cost, please advise this office at your earliest convenience.

We must caution, however, that your indication of approval and consent to incur such fees will not necessarily result in the entire contents of our records being disclosed to you, since we are guided by the provisions of the Freedom of Information Act (Title 5, United States Code, Section 552) and the Privacy Act of 1974 (Title 5, United States Code, Section 552a) in disclosing material from our records. No duplication fees will be assessed for documents not released.

No payment should be submitted at this time.

Your request has been assigned number 255,155 which you are asked to use in any further correspondence concerning this matter.

Sincerely yours,

/s/ James K. Hall
James K. Hall, Chief
Freedom of Information-
Privacy Acts Section
Records Management Division

7e

THE PROVIDENCE (Logo) JOURNAL-BULLETIN
75 FOUNTAIN STREET, PROVIDENCE, R.I. 02902

January 23, 1985

James K. Hall, Chief
Freedom of Information-
Privacy Acts Section
FBI
Washington, D.C.

Dear Mr. Hall:

Regarding your letter dated January 16, 1985, we are willing to pay the cost of duplication at 10¢ per page up to $700 for copies of material related to my Freedom of Information Act request (255,155) of September 26, 1984.

I understand that this is an approximate figure and could be exceeded.

Sincerely yours,

/s/ Robert Kramer
Reporter

7f

FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535
February 22, 1985

Mr. Robert Kramer
The Providence Journal-Bulletin
75 Fountain Street
Providence, Rhode Island 02902

SUBJECT OF REQUEST: Raymond L. S. Patriarca
Recorded
Conversation
Atwells
Avenue

FOIPA NO. 255,155

Dear Mr. Kramer:

This is in further response to your Freedom of Information/Privacy Acts (FOIPA) request(s). Information pertaining to your request has been set forth below in appropriate paragraphs.

[ ] The additional data requested from you has been received.

[X] We have received your letter expressing your willingness to pay fees approximately $700.00.

[ ] We have received your check in the amount of ..... dated .....

[ ] We are currently conducting a search of indices to our central records system files at FBI Headquarters to determine if we have the records you are seeking. Upon completion of this review, we will advise you.

[ ] We have located documents which may pertain to your request(s), and we will assign them for processing soon.

[X] As a result of the large number of FOIPA requests received by the FBI, we may encounter some delay in processing your request(s). The FBI has allocated substantial resources, including manpower, to insure that delays in responding to FOIPA requests are minimized. We solicit your understanding and assure you that we will process your request(s) as soon as possible.

Your continued patience will be appreciated.

[ ] See Continuation Page for additional information.

Sincerely yours,

/s/ James K. Hall
Chief
Freedom of Information-
Privacy Acts Section
Records Management Division
202 324-3000

Department of Justice
Bureau of Investigation

Washington, D.C. 20535

June 13, 1985

Request: Raymond Patriarca
Transcripts

255,155

7g

93 (Rev..8-26-82)

U.S. DEPARTMENT OF JUSTICE
(SEAL) FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535

June 13, 1985

Subject of Request: Raymond Patriarca
Transcripts

FOIPA No. 255,155

Mr. Robert Kramer
The Providence Journal-Bulletin
75 Fountain Street
Providence, Rhode Island 02902

Dear Mr. Kramer:

Reference is made to our letter of 2-22-85. The records which you requested have been processed, and the documents are available for release.

Pursuant to Title 28, Code of Federal Regulations, Sections 16.9 and 16.46, there is a fee of ten cents per page for

duplication. Upon receipt of your check or money order, payable to the Federal Bureau of Investigation, these documents will be forwarded to you.

(To insure proper identification of your request, please return this letter or include the above referenced FOIPA request number with your payment.)

Number of pages: 1463 Amount due: $146.30

[X] See Continuation Page for additional information.

Sincerely yours,

/s/ James K. Hall/lcm
Chief
Freedom of Information-
Privacy Acts Section
Records Management Division

8a

No. 85-707

DEFENDANTS' EXHIBIT C
FOR IDENTIFICATION

NEWS CENTER 12/WPRI-TV12
PROVIDENCE, R.I. 02914

Slug Patriarca Tapes/Jr.
Date 11-14-85
Total Time
Writer white

In 1972, Patriarca was asked his opinion of the book, The Godfather.

2:36 .....

In—Well, in my opinion
3:00 out—with it I guess

.....

That was five years after he learned the FBI had illegally bugged the Providence office from 1962 to 1965.

Joseph Barboza worked for Patriarca. The man nicknamed the animal referred to Patriarca's operation as the Office. He describes what he did to Patriarca's enemies.

.....

ir—I stabbed em

out—approcal of the offi

.....

The FBI transcripts obtained by News Center 12 show that Patriarca was a crime czar whose influence and retribution reached to the top levels of the mafia.

But it is the reference to his son—the 40-year-old—Raymond Junior Patriarca—that have precipated the legal controversy.

According to the transcripts:

"Ray says his boy flunked the college board exams."

"Ray says his boy has been getting refusals of admittance to colleges . . . Claims those refusals are because of his family's background."

"Ray tells Ray Jr. that when he gets married to marry an Italian girl as she will stand by you when you're in trouble, or won't call the police if you rap her in the mouth."

"You have to be a man to rob and that he never robbed any poor people in his life."

8b

No. 85-707

DEFENDANTS' EXHIBIT D
FOR IDENTIFICATION

NEWS CENTER 12/WPRI-TV12
PROVIDENCE, R.I. 02914

Slug Patriarca Tapes
Date 11-15-85
Total Time
Writer White

The junior Patriarca was 17 year old when the FBI illegally bugged his father's Providence office.

The first entry in which the young man was named came on March 3, 1962:

"Talked about Ray's family and his 17-year old biy [sic] who is planning to go to BU or BC—near home. Going to be a lawyer. Things are quiet in Boston." Later there are thises [sic] comments about the Junior Patriarca.

". . . With all this publicity, what school will take him . . . Ray says if he can't get into college, he'll put him up in business."

"Ray wants his boy to get into college on his own merits."

The junior Patriarca, now 40 years old, has not seen the transcripts, which his lawyer says raises a unique freedom of the press issue.

.....

in—this is a peculiar
out—to be distributed.

.....

News organization that have sought the transcripts for almost 20 years have been more interested in the senior

Patriarca, who felt he was persecuted by the media and the government.

2:08 .....

in—if I didn't have . . .
out—America what's going on.

2:25 .....

8c

No. 85-707

DEFENDANTS' EXHIBIT E
FOR IDENTIFICATION

NEWS CENTER 12/WPRI-TV12
PROVIDENCE, R.I. 02914

Slug
Date
Total Time
Writer

Junior Patriarca was born on DATE February 24, 1945 the only child of Raymond L.S. Patriarca.

The illegal bugging of the senior Patriarca's office from 1962 to 1965 gives a glimpse of what life was like for his son.

When Junior was 18 years old, his father tells a visitor he has . . . "tried to keep his brother (Joseph) clean like he is trying with your Raymond."

Later, when junior calls his father from college about a young man—who lives with a priest—who has befriended the young

the senior Patriarca.

But his hopes were dashed for a variety of reasons.

One reason was Illiaro Zannino, known as Larry Baioni, who swung his support to Junior Patriarca.

Law enforcement officials say they are still waiting to see just how strong a crime boss Junior will be.

"RLP had a little background check on the priest. RLP warns his son this boy may be a plant by the feds."

Twenty years later, when the senior Patriarca was rushed dying to a hospital, the way apparently had been paved for his son—then 39-years-old, to take over the mob.

The FBI says that Boston's alleged crime boss Gennaro Gerry Anguilo dearly wanted to replace

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8d

HARTFORD COURANT SUNDAY, SEPT. 22, 1985

FBI LOGS DISCLOSE RANGE OF
PATRIARCA'S INFLUENCE

By Bruce DeSilva
Boston Bureau Chief

PROVIDENCE, R.I.—Raymond L.S. Patriarca, the New England crime boss who died in July 1984, quietly supported his own candidates for public office, secretly bought into race tracks and country clubs, and exerted influence in police stations, judges' chambers, and even a governor's office, long-secret FBI documents show.

The documents—notes written by FBI agents who eavesdropped on Patriarca for more than three years during the 1960s—also disclosed for the first time the private side of a notorious criminal who had long hidden behind a string of "no comments" and Fifth Amendment pleas.

The documents portray Patriarca at the height of his powers—after his consolidation of a criminal empire that

stretched from Rhode Island to Maine but before his organization was weakened by a series of criminal indictments in the 1980s.

News organizations have unsuccessfully sought the documents for two decades. The FBI kept the documents from the public on the grounds that their release would violate Patriarca's right to privacy.

After Patriarca's death, The Courant petitioned for release of the documents on the grounds that the privacy issue was moot. Last Wednesday, the FBI released 2,482 pages of the documents to The Courant. More documents are expected to be released later this year.

During the 1960s, the documents show, a stream of supplicants paraded before Patriarca in his first-floor office at 138 Atwells Ave. in Providence's predominantly Italian Federal Hill neighborhood. Many brought presents: a gallon of spaghetti sauce, a fur coat, a diamond ring.

The supplicants included political candidates asking for his blessing, tavern owners seeking his help in getting liquor licenses, bookies asking that he settle disputes over money and even a young girl asking for advice on a marriage proposal.

Patriarca, the documents show, usually thought he could help or that he knew someone who could. One person Patriarca felt he could call on for a favor, the documents show, was the late John A. Notte Jr., a North Providence, R.I. Democrat who was governor for a two-year term beginning in 1961.

On Sept. 24, 1962, the FBI documents show, Patriarca was overheard discussing the difficulty his son, Raymond

J. Patriarca, was having in changing a course at the University of Rhode Island. Patriarca, the documents show, stated that an unnamed man had just talked with the governor and that the governor was "standing by" to hear what course the younger Patriarca wanted to take.

Although Notte is not named in the documents, he was governor of Rhode Island at the time. The younger Patriarca, known as Ray Junior, succeeded his father as New England crime chief last year, federal authorities say.

On June 27, 1962, the FBI documents show, the elder Patriarca told an associate that it "looks good" for an unnamed man to get reinstated at "the track." Patriarca, the documents show, said he would handle the matter personally by going "directly to the governor." The name of the track, the governor and the state involved are not given.

Despite the power he wielded, the Patriarca of the 1960s was often an unhappy and desperate man, the documents indicate.

Although only in his early 50s, he was in frequent pain from a series of illnesses, including diabetes and heart trouble.

While he had a regular "girl-friend" and showed delight at an offer of being "fixed up" with a "showgirl," he loved his wife, Helen, and was in agony over her long and unsuccessful bout with cancer. Once, in discussing his wife with an associate, he broke down and cried.

Patriarca profited handsomely from illegal gambling and loan-sharking (issuing of loans at illegally high rates). Eavesdropping agents often heard Patriarca count-

ing large sums of cash. However, he was enraged that the legitimate businesses in which he invested were constantly losing money.

And he was always looking over his shoulder for FBI agents, fearful of "stool pigeons," and convinced that his telephones were tapped. Occasionally, the documents show, he complained that his life was "a prison."

Patriarca frequently cursed the FBI, but reserved his most venomous hatred for Robert F. Kennedy, who pursued organized crime figures in his capacity as U.S. attorney general. Several days after the attorney general's brother, President John F. Kennedy, was assassinated in Dallas, Patriarca was overheard commenting that it was too bad the assassins hadn't "nailed" Robert Kennedy instead.

Ironically, as Patriarca expressed paranoia about being watched and followed, the FBI was listening to his conversations daily through an electronic listening device planted in his Federal Hill office.

The agents, who planted the device without obtaining a warrant, eavesdropped on Patriarca daily from March 2, 1962 to July 12, 1965. Although the surveillance was later ruled illegal, and thus could not be used in court, federal authorities say it provided them with invaluable intelligence about the scope of Patriarca's empire.

The released documents consist of "surveillance logs" on which FBI agents wrote notes on what they overheard. About 20 percent of the notes have been deleted by the FBI, primarily to protect the privacy of persons the agency says are "not known to be dead."

Deletion of names makes it impossible to substantiate or disprove persistent rumors that the surveillance documents contain the names of persons who continue to hold prominent public offices in Rhode Island and Massachusetts.

At the time that the eavesdropping took place, Patriarca, who stood 5-feet-6, was a middle-aged man with jet black hair slicked straight back. He had a hawk-like nose, and a wide mouth that usually gripped a nickel cigar. He usually wore conservative suits with white socks.

He was to die of heart failure in a Rhode Island hospital more than 20 years later while under indictment on several state and federal charges, including accessory to murder. Until the day he died, he maintained he was a simple businessman unfairly persecuted by the law.

New England journalists and the public have long speculated about the extent of Patriarca's influence during his 30-year reign as the region's crime boss. The FBI logs, in some cases, exceed even the wildest speculations.

The documents show that the New England crime boss was deeply involved in the region's electoral politics.

On May 5, 1962, Patriarca was overheard saying he was going to defeat a candidate for public office so there was no point in talking to him. "If Ray does talk to him," the surveillance log reads, "it will be to warn him that this is his last chance to play ball."

On Aug. 2, 1962, the log shows, Patriarca seemed to be "making a deal" with a political candidate. "Ray [meaning Patriarca] says if his man wins," the log reads, "he will fullfill any promises to this man." The log says Pa-

triarca hoped that an unnamed candidate would not win because "he will put out of business guys like Ray and the man talking."

On July 10, 1962, Patriarca was heard pressuring a candidate to pull out of a political race in Providence's 5th Ward.

On Oct. 24, 1962, he was overheard discussing making political contributions to gubernatorial candidates apparently in Maine, the log states.

On Nov. 7, 1962, during a discussion of elections, he was overheard saying that "some of these guys shoot their mouths off, offer to call the governor right up for you. I never went near the guy. This would only harm the guy." It is not clear what governor he was referring to.

On June 15, 1964, an unnamed man told Patriarca that he had arranged to put up two campaign signs for an unnamed candidate. Patriarca, the log says, instructed the man to "tell the people where he is placing them that Raymond appreciates it very much."

On two occasions in 1963, Patriarca seemed to lament Notte's loss of the Rhode Island governorship, and he predicted Rhode Island would not have another Italian governor for at least 20 years.

The logs show Patriarca had access to officials and agencies that should not have been readily available to a crime boss.

For example, when Patriarca wanted to know who owned certain cars, he twice called someone at the Rhode Island Registry of Motor Vehicles and recited the registration numbers.

On June 15, 1962, Patriarca was overheard telling an unnamed man to "send his boy for summer work to [name deleted] on the second floor of the Registry Building" in Providence.

Twice in August 1962 and again in February 1963, people asked Patriarca to fix traffic tickets. Patriarca indicated he could do so.

On Oct. 17, 1962, Patriarca was overheard discussing the delivery of "lottery tickets" to Newport, R.I. by a Rhode Island state trooper. There was no legal lottery in Rhode Island at the time.

Talk of "fixing" criminal cases and obtaining "protection" from police officers was also common, the logs show.

For example, on June 4, 1962, Patriarca was overheard discussing a criminal case in which two jurors and the judge were on "his side." The log states Patriarca indicated the case had cost him $5,000, apparently a payoff.

On Nov. 9, 1962, Patriarca was overheard advising a man in trouble with the law to see an unnamed man in a district attorney's office and mention Patriarca's name. The man in the office, Patriarca said, "is a dear friend of mine."

On Jan. 22, 1963, Patriarca was overheard saying that his organization once had "100 percent protection in Boston" but that "things are tough" now because of a certain FBI agent.

On June 15, 1964, Patriarca indicated that an unnamed associate of his "knows all of the judges who can be reached" in Boston.

And on June 10, 1964, Patriarca was overheard saying that a "beef" against a criminal was "squashed by a judge for $1,000," the log shows.

The logs also contain several references to attempts to "fix" grand jury proceedings and persuade witnesses not to talk.

On Jan. 16, 1963, Patriarca said that if a potential witness in a criminal case "doesn't change his story, he is dead and if his family doesn't help him change his mind, they are dead, too," the log shows.

Patriarca's influence, the logs show, also extended to unexpected areas. For example, on Nov. 29, 1962, a man asked permission to use the crime chief's name in order to get a loan from a savings and loan institution. Permission was granted.

And on two occasions in June 1963, Patriarca was asked to use his influence to get certain records played on Boston and Providence radio stations. On one of those occasions, Patriarca indicated he could be of assistance.

During the second half of 1962, the logs show, Patriarca had extensive conversations with members of a Rhode Island laborers union about union elections. There was talk about getting "their" ticket into office.

In 1981, Patriarca was indicted for labor racketeering in connection with the laborers union, but he died before the federal case could be brought to trial.

On Feb. 8, 1962, Patriarca was overheard discussing "getting word from Hoffa in New York about (deleted),"

the log shows. This is one of three tantalizing but inconclusive references in the logs to Jimmy Hoffa, the former International Teamsters Union president who now is believed to have been slain.

On several occasions, Patriarca was overheard discussing "The Commission." Federal law enforcement authorities believe this to be the national governing body for organized crimes, responsible for mediating disputes between crime families and dividing up territory for criminal activities.

Most organized crime leaders have long denied the existence of "The Commission." The so-called "Five Families" trial set to begin in federal court in New York City early next year is in part an attempt by federal authorities to prove "The Commission's" existence.

The FBI's Patriarca surveillance log for Oct. 1, 1964, states the following: Patriarca "tells (name deleted) he was in New York yesterday at a Commission meeting and that (name deleted) has been disowned as well as his Family, which Raymond (meaning Patriarca) feels consists of from 200-400 members. Raymond instructs (name deleted) not to have any business with any of the (name deleted) Family and to treat them as outsiders. Raymond states (name deleted) was on the Commission and would have to give up sharing a million dollars a year from drugs and Las Vegas gambling."

Linking log entries with events known to have occurred in 1964, it is possible to deduce that Patriarca was discussing the plight of Joseph Bonanno. That former New York City crime boss has acknowledged that he was

expelled from "The Commission" during a power struggle with other New York crime families that year.

As expected, the logs are replete with discussions of illegal gambling and loansharking in many Rhode Island, Massachusetts and Maine cities. There is also a reference, on March 27, 1962, to establishing control of gambling operations in the Carribean nation of Haiti. No details of this are given.

Occasionally, the logs show discussions about large quantities of stolen goods, ranging from jewelry to refrigerators. On March 12, 1962, a man talked with Patriarca about cashmere coats and 2,500 pairs of slacks. Patriarca, the log notes, apparently bought them all.

Talk of money was almost constant, with a stream of persons entering the office to pay Patriarca money owed to him, to seek loans, or to ask him to invest in various enterprises. The logs show that the amounts discussed were often in the thousands and sometimes in the hundreds of thousands of dollars.

Despite dealing in such large sums, the logs show, Patriarca remained insistent on payment of much smaller debts, often under $100.

Often there was talk of violence. A favorite phrase of Patriarca's, the log shows, was "Put him in the hospital." On Aug. 8, 1962, for example, Patriarca heard a complaint that a gambler was "welching" on a debt. Patriarca, the log also shows, said that "the only thing to do is to give him a beating and make him pay."

In addition to his illegal activities, the log shows, Patriarca invested in a variety of legal businesses. There was discussion of hotels in Miami, for example. And on

March 14, 1963, Patriarca was overheard saying he "put plenty of money in the hotel supply business."

Few of his investments seemed to be successful, and Patriarca sometimes complained bitterly.

The logs disclose that he owned a Rhode Island company called D&H Trucking, which by June 1964 was on the verge of bankruptcy.

On Jan. 15, 1962, Patriarca was overheard saying he owned 75 percent of Indian Meadows Country Club near Worcester, Mass. Over the course of the year, he was overheard complaining about the investment and saying that the place was "not run right."

On Sept. 18, 1962, Patriarca was overheard saying he and "his people" had a $1.5 million investment in Berkshire Downs, a race track that was located in the western part of Massachusetts. Over the next two years, he was overheard complaining about mismanagement at the track. And he made frequent trips to New York City to seek a buyer to take it off of his hands, the logs show. The track has since closed. Patriarca's interest in it was previously publicly disclosed through federal investigations.

On several occasions, Patriarca was overheard saying that he had a $70,000 investment in Lincoln Downs, a horse track in Lincoln, R.I. His interest in that track, which has since closed and reopened as a dog track under new ownership, had been rumored but has not previously been publicly confirmed.

Patriarca was heard saying of Lincoln Downs: "What good is it if you can't make any money on it? You can't even get a return of 3 percent on your investment," the log shows.

The logs also show that Patriarca spent many hours listening to people's troubles, dispensing advice and distributing favors.

A woman asked him to help in arranging a marriage for a young couple whose parents were withholding their permission. A man asked the crime chief to intercede in a domestic squabble. A cafe owner wanted Patriarca's advice on a new location for his business, and Patriarca suggested one. A man asked Patriarca to help get his daughter into Bayview Academy, a private girls school in East Providence, R.I. Patriarca said he could speak to someone.

The crime boss was also overheard dispensing occasional words of wisdom to his teenage son, Raymond. When you get married, Patriarca told his son, "marry an Italian girl and she will stand by you when you are in trouble and won't call the police if you rap her in the mouth."

Patriarca, the logs show, saw himself as a man unfairly persecuted and beset by troubles.

He frequently worried about being cheated, as in June 1962, when he suspected that he was being "taken" on some horse racing bets.

He feared that a young man who befriended his son at the University of Rhode Island was a "plant" from the FBI.

On his frequent trips to New York City, often to meet with organized crime chiefs, he took elaborate precautions to avoid being followed.

On Nov. 7, 1964, he was overheard explaining that he would arrive in the city an hour before his appointment

and take a cab up 8th Avenue to a hotel. He would hang around the lobby for a while, take an elevator to the tenth floor, walk down a flight, and take an elevator back to the lobby. Then he would slip out a side door. If his appointment was, say, on 55th Street, he would take a cab to 59th and then double back.

Patriarca boasted of what a great job he usually did ducking the authorities. The FBI agent listening in penned a one-word comment in his log: "Ha!"

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

IN THE MATTER OF	)	
APPLICATION TO ADJUDGE	)	
THE PROVIDENCE JOURNAL	)	
COMPANY AND ITS	)	NO. 86-003
EXECUTIVE EDITOR,	)	
CHARLES HAUSER, IN	)	
CRIMINAL CONTEMPT	)	

FEBRUARY 10, 1986
9:30 A.M.

FEDERAL BUILDING
PROVIDENCE, RHODE ISLAND

BEFORE THE HONORABLE FRANCIS J. BOYLE

APPEARANCES:

FOR THE PLAINITFF [sic]: WILLIAM A. CURRAN, ESQ.
-and-
ROBERT D. PARRILLO, ESQ.

FOR THE DEFENDANT: EDWARDS & ANGELL
BY: JOSEPH V.
CAVANAGH, JR. ESQ.
-and-
EDWARD F. HINDLE,
ESQ.
-and-
KNIGHT EDWARDS, ESQ.

(p. 2)

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(p. 3) (COMMENCED AT 9:31 A.M.)

The Clerk: The matter before the Court is, in the matter of application to adjudge the Providence Journal Company and its executive editor Charles Hauser in criminal contempt, Miscellaneous 86-003.

Mr. Curran: Ready for the applicant.

Mr. Cavanagh: Ready for the defendant, sir.

The Court: Do you have a stipulation of fact?

Mr. Curran: Yes, your Honor I believe the original of stipulation of facts has been filed with the Court.

The Court: When was it filed?

Mr. Cavanagh: Yes, it has.

The Court: When?

Mr. Cavanagh: On Friday afternoon.

Mr. Cavanagh: We have a copy of that.

The Court: Are all of the exhibits here?

Mr. Cavanagh: Yes.

Mr. Curran: Yes, your Honor.

The Court: How about 7 and 8?

Mr. Curran: Seven and eight are there.

The Court: Letters of—

(p. 4) Mr. Curran: Letters of communication between the Journal and the Federal Government; and also 8 are materials pertaining to t.v. scripts and the "Hartford Current."

The Court: Now, I don't see the tape here.

Mr. Cavanagh: The transcript of the tape I believe is attached.

The Court: All right.

Mr. Cavanagh: Do you see it?

The Court: I'm beginning to find it now. All right. All right, I see. All right. You may proceed.

Mr. Curran: If it please the Court, I'm William A. Curran, Special Prosecutor appointed by this court on December 16, 1985 to seek contempt against the "Provi-

dence Journal" and its editor, Charles M. Hauser. Pursuant to that appointment, I have applied and obtained from the Court a Show Cause Order against the defendants seeking to find them in criminal contempt for the publishing in violation of this Court's order of November 13, 1985, the materials pertaining to airtels that relate to conversations between Mr. Patriarca and others pertaining to the plaintiff in the original (p. 5) action Raymond J. Patriarca versus the "Providence Journal," WJAR TV and the Federal Bureau of Investigation and other parties of the United States Government. As I say, the order is issued; and we're here today, your Honor, for the Journal and Mr. Hauser to establish that he should be found in contempt.

The Court: Mr. Cavanagh?

Mr. Curran: By the way, does the Court request that we read into the record the stipulation of facts; or is it sufficient—

The Court: Life is simply too short for that Mr. Curran. This is a half inch stack of papers.

Mr. Cavanagh: Your Honor, my name is Joseph D. Cavanagh, Jr. I represent the defendants in this action. At this time I call Chuck Hauser to the witness stand.

CHARLES McC. HAUSER (Sworn)

DIRECT EXAMINATION BY MR. CAVANAGH

The Clerk: State your full name and spell your last name for the record, please.

The Witness: My name is Charles Newland McC. Hauser, H-a-u-s-e-r.

(p. 6) Q. Mr. Hauser, where do you reside?

A. I reside in Barrington, Rhode Island.

Q. What is your occupation?

A. I'm a newspaper editor.

Q. How long have you been employed as a newspaper editor?

A. I've been employed in my current job for approximately 12 years but more years than that in various editing jobs.

Q. You are presently employed by the Providence Journal Company?

A. By the Providence Journal Company.

Q. What is the exact title that you hold with the company?

A. I'm the vice-president and executive editor of the "Journal Bulletin."

Q. And you've held that title for how long?

A. Twelve years.

Q. Could you briefly describe for the Court your educational background?

A. I received a bachelor of arts in journalism from the University of North Carolina; and I've been through the program for management development at the Harvard Business School, which is sort of a half year, mini MBA program.

(p. 7) Q. And when did you graduate from college?

A. In 1954.

Q. Could you give us a brief outline of your employment history before you came to work for the Providence Journal Company?

A. I worked in North Carolina after graduation for a semi-weekly newspaper, the "Chapel Hill Weekly." I worked for the "Charlotte Observer" and the "Greensboro Daily News," both daily newspapers in North Carolina. I also worked in the Washington bureau of the "Charlotte Observer." I went overseas and worked in Paris and London with United Press International, returned for a time with the "Charlotte Observer" then returned to the "Charlotte Observer" then went to Greensboro, North Carolina then to Norfolk, Virginia with "The Virginian Pilot and Ledger Star" there and then 12 years came to Providence.

Q. Those jobs you just listed involve in part editing and reporting?

A. All of those jobs involved editing and reporting responsibilities except for Norfolk when I was the vice-president and general manager with overall responsibility for the newspaper.

Q. Mr. Hauser, what are your duties and (p. 8) responsibilities as executive editor of the newspaper presently?

A. I'm in charge of all the nonadvertising content of the newspaper; and I supervise a staff of approximately 300 people of the news department of the Journal, which is engaged in producing that material. For the past year I've temporarily been assigned additional duties that are the equivalent of being general manager of the newspaper.

Q. Aside from your formal education, have you participated in any continuing education courses in the journalism field?

A. I've taken a number of seminars including the Pointer Institute for Media Studies in St. Petersburg, Florida; the American Press Institute in Restin, Virginia and the Communication Law Seminar of the Practicing Law Institute in New York City.

Q. Have any of these educational programs dealt with issues involving the First Amendment and Prior Restraint?

A. Many of them have dealt with the First Amendment and Prior Restraint issues. The practicing law Institute Seminar, of course, had a good bit more on that.

(p. 9) Q. Have you made it a practice to be familiar with the history of the First Amendment and Prior Restraints in this country?

A. I would say I've studied those matters since journalism school and for many years throughout my career.

Q. Mr. Hauser, are you familiar with the news article which was published in the "Providence Journal" newspaper on November 14, 1985, entitled, "Patriarca Senior to Son, "You only lie to cops and people you don't know"?

A. Yes, I'm familiar with that article.

Q. Did you participate in any way in gathering the information which was published in that article?

A. Not directly; but under my supervision steps were taken to obtain the materials that were incorporated in that article; and, of course, it was written under my general supervision.

Q. Could you describe briefly the process and the time frame in which the Providence Journal sought to obtain that information?

A. In the fall of 1984, after the death of Raymond L. S. Patriarca, we applied to the—through the Federal Information Freedom of Information Act to the FBI for the summaries of (p. 10) the bugging of Mr. Patriarca's office; and in a relatively short period of time during the following year we received a great deal of that material.

Q. The various letters which are attached as Exhibit 7-A through 7-G in the statement of facts, are those the correspondence between the government and the Providence Journal concerning that information?

A. Yes, that's correct.

Q. Why did you as an editor in the Providence Journal in general want to obtain this information?

A. We felt the information was a definite public interest and that it was in the best interest of the public to print it because it involved activities of organized crime.

Q. Did you consider at all that it also involved the conduct of the government?

A. I don't understand the question.

Mr. Curran: I object. It's leading.

The Court: Well, if the witness doesn't understand the question, it's not a problem. Next question, please.

Q. Were you aware of the lawsuit filed by Raymond Patriarca, Jr. in the United States District Court (p. 11) against the Providence Journal and others?

A. Yes, I'm familiar with that case.

Q. When did you first become aware of that lawsuit?

A. Sometime in November of last year.

Q. Was it prior to the publication of November 14 which you previously testified to?

A. Yes, prior to that publication.

Q. On November 13, 1985 did you become aware that Mr. Patriarca was able to obtain a temporary restraining order from the Federal District Court?

A. Yes, I did.

Q. When did you first become aware of that fact?

A. It was late—late in the day of the 13th, around suppertime that evening.

Q. Were you informed of the nature of the order entered by the Court?

A. Yes, I was.

Q. And after learning of it when you were at home, what did you do?

A. I learned of that through a phone call to my home, yes.

Q. That's right. And what did you do then?

A. I went to the office, went to the Journal.

Q. And who made the decision to publish the article which we referred to previously?

(p. 12) A. I made that decision.

Q. Did others participate in the decision?

A. Yes, there were three others directly involved in the conversations and the discussion. One was James V. Wyman, the deputy executive editor, a long time newspaperman whose judgment and advice I trust and respect. He concurred in the decision. And my publisher and chairman of the Journal, Michael Metcalf, approved the decision without which we could not have published it.

Q. Incidentally, I referred to the article in the morning paper on November 14. There was also an article published in "The Evening Bulletin" on November 14 entitled, "Fatherly advice from Patriarca, Sr." Did you also decide to publish that article?

A. Yes, it's an identical article with slightly different headline.

Q. Did you and Mr. Wyman and Mr. Metcalf discuss the question of whether or not to publish before you made the decision?

A. Yes, we discussed it at great length during that evening.

Q. Could you share with the Court some of the issues (p. 13) which were discussed that evening prior to making the decision?

A. We were extremely concerned with the fact that our decision involved disobeying an order of the Federal Court. We realized that that would be a very serious action to take and were very concerned about that. At the same time we were very concerned with the implications of the First Amendment to the Constitution and

the fact that we considered the judge's order a Prior Restraint.

Q. With respect to the article that was published on Thursday morning, November 14, which you've previously testified about, what was the last available time for the newspaper to put that article to press?

A. Because our press actually starts running about 1 o'clock in the morning, the latest we really can prepare materials to go in that edition is about 10:30 at night.

Q. So that on November 13, Wednesday evening, the deadline was 10:30 that night for publication the next morning?

A. Effectively the deadline was about 10:30, yes.

Q. Did you consider that the Court Order to the (p. 14) Providence Journal was a Prior Restraint in your view?

A. There was no question in our minds that it was a Prior Restraint.

Q. Why?

A. We felt that it was such a clear case of material which we had in our possession, we had it in our possession lawfully, which we felt was important to us and that having that in our possession, that the First Amendment protected us in our decision to publish it.

Q. Had you ever been—

Mr. Curran: Excuse me, your Honor. May I have that answer read back?

(PREVIOUS ANSWER READ BACK TO MR. CURRAN BY COURT REPORTER)

Q. At the time you made the decision to publish, did you consider that the Court Order was a Prior Restraint?

A. We did consider that, that the Court Order was a Prior Restraint in violation of the First Amendment.

Q. Did you consider at all what precedent might be set if you refrained from publishing it?

(p. 15) Mr. Curran: Objection, your Honor.

The Court: Precedent for whom, Mr. Cavanagh?

Mr. Cavanagh: For the Providence Journal.

The Court: Precedent for the Providence Journal. Sustain the objection.

Q. That evening, when you decided to publish, what other factors did you consider other than the fact that you thought it was a Prior Restraint?

A. We considered that failing to publish in the next edition of "The Journal" would be a clear signal to people that frequently liked to block publication of something, whether politicians or office holders caught doing improper things, members of organized crime; that if those people felt they could use the courts to block publication, that that would be a serious message to send to them.

Q. Why were you concerned that that would be the wrong message from your point of view?

A. Frequently we have—well, at all times we have a number of stories under investigation and being worked on that are extremely sensitive; and sometimes they're very time sensitive, delay of (p. 16) publication for even a day or two can be extremely critical at times.

Q. Did you consider what alternatives you might have to publishing?

A. The only alternatives open to us, as we understood it, one, of course, the question of appealing from the ruling came up; but our understanding was that there was no practical way to appeal that night from a temporary restraining order; and we felt that we did have to publish that night. We did consider the alternative of waiting one day, giving ourselves one more day to consider all the facts, to weigh our decision and publish one day later, but we felt the damage done to the First Amendment by waiting even one day was too crucial.

Mr. Cavanagh: Just one minute, your Honor, please.

The Court: Certainly.

(Pause)

Q. One final question, Mr. Hauser. At the time you decided to publish, did you believe that the First Amendment of the Constitution gave you the right to do so?

(p. 17) Mr. Curran: Objection. No, I withdraw the objection, your Honor.

The Court: All right, you may answer.

A. Yes, we believed that the—because the First Amendment prohibits prior restraints on publications that it did give us that right.

Mr. Cavanagh: Thank you, I have no more questions.

CROSS-EXAMINATION BY MR. CURRAN

Q. Mr. Hauser, I gather from your direct testimony that you've had a great deal of experience in studying the First Amendment and this question of prior restraints?

A. Yes, I would say so, yes.

Q. So you do have some familarity with the law as such?

A. I'm not a lawyer; but I do have some familiarity with the law.

Q. Do you believe that no one, no matter how righteous his private motives, can't be a judge in his own case?

Mr. Cavanagh: Objection.

The Court: What's the basis of the objection?

(p. 18) Mr. Cavanagh: It's irrelevant with respect to this matter. His opinion in a hypothetical, which isn't confined to this case.

The Court: It seems to me that you have opened the door in asking the questions that you asked that we are going to have a witness who tells me he's not a lawyer to tell me what the law is. Since he's told me part of it, we'll hear the rest of it, all right. You may answer the question. Do you wish it read back?

(PREVIOUS QUESTION READ BACK BY COURT REPORTER)

A. That I believe that no one can be a judge in his own case? I don't understand the question.

The Court: Irrespective of the motive. Do you understand the question?

The Witness: I don't understand the question.

Q. You don't understand that question? Let me read to you from an opinion that I assume you or counsel for the Providence Journal did consider in this problem; and

it's quoted from the case of the United States versus United Mine Workers in 1947 case 330 U.S. 258 at page 308, 310. This is language of Mr. Justice Frankfurter. "No one, no (p. 19) matter how righteous his private motive, can be judge in his own case. That is what courts are for." Do you understand that?

A. I understand that language, yes.

Mr. Cavanagh: Objection.

The Court: What's the basis.

Mr. Cavanagh: Argumentative.

The Court: The witness has told us he didn't understand it in the first place, now he does. What's argumentative about that?

Mr. Cavanagh: My objections on the record.

The Court: All right, overruled.

Q. Do you agree with it?

A. In general I would say I agree with it, yes.

Q. I assume you would also agree with the language, "Rhode Islanders who believe in the rule of law and that thought be—must appreciate Superior Court Judge Corrine P. Grande's strong enforcement of that standard in the Pawtucket school teachers strike?

Mr. Cavanagh: Objection.

The Court: Basis.

Mr. Cavanagh: Same grounds. Also relevance.

(p. 20) The Court: Well, it seems to me that you put this witness on the witness stand to testify that this was a Prior Restraint, a clear case of material in his posses-

sion lawfully of which the First Amendment protects the right to publish it. You opened the door of this kind of thing. I'm not going to spend a lot of time listening to it; but I'm going to allow this.

(PREVIOUS QUESTION READ BACK BY COURT REPORTER)

A. My feeling is that if someone disagrees with the law, they must be ready to take the consequences of any actions to carry out that disagreement.

Q. That was a quote from the "Providence Journal" of September 19, 1985; isn't that so?

A. I believe that was correct. That was an editorial in "The Journal."

Q. And it was the Journal's policy as well as yours as the general manager, so to speak, equivalent to general manager, that all Rhode Islanders should follow the rule of law?

A. Certainly in that particular case, that was our policy. I don't think that editorial was presuming to anticipate the facts in other cases.

(p. 21) Q. No. That editorial was dealing with the rights of people who were on strike; is that true?

A. I think that editorial was dealing with—the editorial was dealing with teachers who violated the law and then violated a Court Order upholding the law.

Q. Just so—I don't want to trap you. Just read it. It's the bottom part of that.

A. All right.

Mr. Curran: Do you have any objection to having this marked as an exhibit?

Mr. Cavanagh: Yeah, I object on the grounds of relevance.

The Court: Do you have other editorials you want me to read, too, Mr. Curran?

Mr. Curran: No, your Honor. I wouldn't burden the Court with another one.

The Court: Mark this for identification. I'm not going to include it as full.

(WHEREUPON, THE EXHIBIT WAS RECEIVED IN EVIDENCE)

Q. Mr. Hauser, before we leave that topic of the strike, that and the actions of the strikers that gave rise to the editorial I read from, it's a fact that the strikers or school teachers were (p. 22) asserting their rights one way or the other?

Mr. Cavanagh: Objection. Same grounds.

The Court: Overruled, you may answer the question.

A. I'd say they were taking actions. I don't know whether they're asserting rights or not.

Q. They were taking actions?

A. In support of their beliefs.

Q. In support of their beliefs. And as individuals—acting as individual citizens; correct?

A. Yes, I would say; and I don't know that they were asserting any particular rights, but—

Q. You don't know if you could recognize their rights, but you know they were taking a position that they thought was right?

A. That's correct.

Q. Correct?

A. Uh-huh.

Q. In the litigation that gives rise to this application for a showing of contempt, that was litigation brought on behalf of a private citizen; was it not?

The Witness: In this case?

Mr. Curran: In the initial case, correct, the one that was filed on November 8, (p. 23) that you were aware of, 1985, that you were aware of?

A. That's my understanding, yes.

Q. And in that litigation, Raymond J. Patriarca, was asserting his right to privacy; was he not?

Mr. Cavanagh: Objection.

The Court: Basis.

Mr. Cavanagh: Relevancy. Calls for a conclusion of law.

The Court: You know, you can't have it both ways Mr. Cavanagh. You put all this in to begin with. You opened the door. Overruled.

Mr. Cavanagh: With all due respect, he gave his opinion as to why he did what he did.

The Court: And his opinion may be tested; and it is being tested. That's why I'm allowing this line of questioning. Your objection is overruled.

(PREVIOUS QUESTION READ BACK BY COURT REPORTER)

A. My understanding, yes, of that case is he was asserting his right to privacy.

Q. And in asserting that right, he sought to enjoin the "Providence Journal," and when I say "Journal," I also mean the bulletin, "Journal (p. 24) Bulletin," to enjoin them from publishing materials which might impinge or effect his privacy; isn't that so?

A. I think that was what he stated, yes.

Q. And in furtherance thereof there was this motion that I'm sure you became aware of somewhere along the line that he was seeking a temporary restraining order from the publication of materials based on airtels and matters that you had received from the Freedom of Information Act request?

A. Yes, I'm aware of that.

Q. And you've testified that you were aware counsel for "The Journal" and counsel for Raymond Patriarca, had met with the Court, and the Court had issued on November 13, 1985, a temporary restraining order; isn't that so?

A. Yes, I became aware of that that night.

Q. Now, do you know when your counsel met with the Chief Judge of the Federal Court?

A. I don't know the precise time. I assume assume it was sometime that afternoon.

Q. In any event, you didn't hear about it until suppertime; is that correct?

A. Yes, that's correct.

(p. 25) Q. Do you know whether anyone else at the "Providence Journal" office heard about it prior to your becoming aware of it?

A. Mr. Wyman was aware of it, yes, and our reporter. I'm sure our reporters and editors involved in the news story were aware of it.

Q. And Mr. Wyman is sitting here in the courtroom?

A. That's correct.

Q. When do you think—when do you—strike that. When did the "Providence Journal" start working on the story based on the airtels, if you know?

A. The reporter assigned to that story or series of stories based on those airtels started working as soon as we got the first airtels, I think in July of 1985. Now, when he started working on the material in this specific story, I'm not sure, but there were a number of stories he was pulling together from those airtels.

Q. And he—strike that. When you say "he," who are you referring to?

A. Robert Cramer [sic] was the reporter assigned to that.

Q. And Robert Cramer [sic] was the one who made the application to the Federal Government for the materials?

(p. 26) A. I believe his signature is on all those applications, yes.

Q. They form, a part of Exhibit H, your Honor, of the stipulation of facts—

The Court: Exhibit 7?

Mr. Curran: Seven. I'm sorry.

Q. And in respect to that, Mr. Cramer [sic] had materials ready for publication prior to November 13, 1984, did he not?

A. He was working on a number of stories that were in various stages of completion based on those airtels.

Q. And the Journal had these airtels as early as the early part of the summer, it's [sic] that your testimony, 1985?

A. I believe we received the first ones in July of 1985 or approximately that time.

Q. And just to make sure what we're talking about, these are airtels that relate to Raymond J. Patriarca; is that so?

A. These were airtels of conversations recorded in the offices of Raymond L.S. Patriarca. They concerned Raymond J. Patriarca only incidentally. They concerned a great many things. He was just one of the subjects of those airtels.

(p. 27) Mr. Curran: I move that answer be stricken as nonresponsive.

The Court: Well, Exhibit—Exhibit 7-A is a letter from the Providence Journal Bulletin to Federal Bureau of Investigation and it seeks copies or access to transcripts and summaries of conversations recorded at the Atwells Avenue office of Raymond L.S. Patriarca in Providence, Rhode Island during the period March 6, 1962 to July 12, 1965. The motion is denied.

Q. Do you know whether counsel for the Journal had possession of the airtels and other material that the Journal had procured from the Federal Government when

it went to the meeting with the Court on November 13, 1985?

A. I don't know.

Q. You don't know that? Do you know whether the Providence Journal gave access to the attorney for Raymond J. Patriarca or to Raymond J. Patriarca access to those airtels and other materials procured from the Federal Government?

A. I'm quite sure we didn't give them access to any materials in our possession.

Q. So just to set the stage, so to speak, for the meeting of November 13, 1985, in the chambers of (p. 28) Federal Court, the Journal had materials that they had obtained from the Federal Government and, of course, the Federal Government had the materials that they had furnished to the Journal. Is that a fair statement?

A. That's correct.

Q. And as far as you know, the Journal didn't give copies to Mr. Patriarca and wouldn't, in any event?

A. We would not share those copies with anybody.

Q. Besides Mr. Cramer [sic], who else in the employ of the Providence Journal was aware of the contents of the materials that have been obtained from the Federal Government pertaining to Raymond J. Patriarca as of November 13, 1985?

Mr. Cavanagh: Objection.

The Court: Basis?

Mr. Cavanagh: Relevance.

The Court: Where are we going with this line of questioning?

Mr. Curran: I just want to establish, your Honor, that they had this material, they were working on this material, Mr. Cramer [sic] and others, and that there was editorial advice pertaining to the publication thereof, whether it was to occur (p. 29) on November 14 or any other time.

The Court: Well, the latter part of your observation you're not asking at this point.

Mr. Curran: No, I'm not.

The Court: And the former part I don't know whether I'm interested in whether one person or 11 people were working that night. I'm going to sustain the objection. Or indeed if everybody was working that night.

Q. Who was it that represented the Journal at the meeting of November 13, 1985 with the judge?

A. I'm not sure which specific member of the Edwards & Angell firm represented us that day.

Q. But it would be members of the Edwards & Angell firm?

A. Of that firm, yes.

Q. Do you know whether Mr. Wyman was aware of the fact that they were to confer with the Court about this request for a temporary restraining order on November 13?

A. I didn't catch the question.

(PREVIOUS QUESTION READ BACK BY COURT REPORTER)

A. I don't know whether he was aware of that in advance, no.

(p. 30) Q. Do you know who in the employ of the Providence Journal was aware that they were going to confer with the Court on November 13, 1985?

A. I would say Mr. Wyman would be the most likely person to have that knowledge. I just don't personally know whether he knew about it in advance.

Q. Anyone else?

A. Not anyone else in particular. Mr. Wyman is our liaison with our legal counsel.

Q. Now, you've indicated that Mr. Metcalf was the publisher?

A. That's correct.

Q. When did he first become aware of the meeting with the Court on—of November 13, 1985?

A. I don't know.

Q. Aside from Mr. Metcalf, would anyone else at the Journal know?

A. Mr. Metcalf would be the key person that would be informed when a legal question like that is being discussed. Other people might know incidentally.

Q. Would it be customary for the publisher to be brought in even before materials such as this are published without any restraining order?

(p. 31) The Court: What's the objection?

Mr. Cavanagh: Objection.

The Court: Basis?

Mr. Cavanagh: Relevance.

The Court: I'm going to allow it.

Mr. Cavanagh: Also the form of the question, "customary," and no foundation.

The Court: I'm going to sustain the objection as to the form of the question. I suppose what he wants you to ask is, is it the practice of.

Q. Is it the practice of the Providence Journal Bulletin to have the publisher aware that the staff is working on materials of the nature we're concerned with here today?

A. It would be the practice for us to make him aware of the most sensitive and serious stories, which would not be terribly often.

(PREVIOUS ANSWER READ BACK TO MR. CURRAN BY COURT REPORTER)

Q. Would that include making him aware of the fact that a lawsuit had been filed on November 8, 1985, seeking to protect the rights of privacy of Raymond J. Patriarca?

(p. 32) A. Because of the nature of this situation and our long fight to get those airtels, yes, that would be something that he would be made aware of.

Q. So there really isn't any question in your mind that Mr. Metcalf as publisher was aware prior to November 13, 1985 that you did have these materials that pertained to the rights of Raymond J. Patriarca?

Mr. Cavanagh: Objection.

The Court: Sustained.

Q. Now, I believe your testimony was that on about suppertime you became aware that the Court had issued

a temporary restraining order against the "Providence Journal." I suppose the next question logically would be, when do you have supper?

A. I'd say that was about 6 o'clock in the evening, 5:30, 6 o'clock, something like th[illegible]

Q. Who was it that contacted you?

A. Pardon.

Q. Who was it that contacted you?

A. I believe the first call I had received was from Mr. Metcalf.

Q. The publisher?

A. Yes.

Q. What did he say?

(p. 33) A. He asked me whether I was aware of what had been going on that afternoon; and I told him, no, that I had just gotten home but that I would consult with Mr. Wyman and we'd get back to him shortly.

Q. Did he indicate to you that he was aware of what had been going on that afternoon?

A. Yes, certainly; because he was asking me what I knew about it.

Q. Anything else told to you by Mr. Metcalf at that time?

A. No, I think our conversation was fairly short?

Q. As a consequence of which you went to the office?

A. I talked to Mr. Wyman by telephone and then went to the office after that.

Q. And Mr. Wyman is your assistant; is he?

A. He's my chief deputy, yes.

Q. Chief deputy. And was this a telephone conversation with Mr. Wyman?

A. I telephoned Mr. Wyman from home before I went to the offers [sic].

Q. Was he at home?

A. He was at the office.

Q. At the office?

(p. 34) A. At the Journal.

Q. And what did you say to Mr. Wyman?

A. I told him Mr. Metcalf had called me, asked about a restraining order placed on us and asked him for information about that; and he informed me that they indeed were under a restraining order and that we needed to discuss the situation and how we should act on that order that evening; and I told him I would go down to the office as quickly as possible.

Q. Now, at that point in time, did you discuss whether the story was ready to go, so to speak, go to press?

A. I don't recall discussing that at that time, no.

Q. When did you first discuss when you would go to press?

A. I think very, very quickly after I got to the office I asked if the materials were ready for publication and was told, yes, they were or they could be very quickly.

Q. Now, just so the Court is aware, I suppose aware of my ignorance, you don't set print any more, do you, as

they use to? I mean, it's not a question of getting the letters together and putting them (p. 35) in a box?

The Court: Benjamin Franklin did it that way.

Q. They don't do that any more; do they?

A. It's a much faster procedure where the reporter types his story into a computer terminal, and the computer sets the type.

Q. When was the story put in the computer, not when it activated the press; when was it put into the computer that was the basis of the article of November 14, 1985?

A. Because reporters—reporters write their stories into the computer all the time, I'm assuming the story in some form was already in the computer.

Q. And it's for that reason that you have the ability to meet this 10:30 deadline and get the materials on the truck and out for distribution early in the morning, 1 o'clock?

A. The computer certainly speeds up that process.

Q. And there isn't any question in your mind that this material or some of the material was already ready to go even before you heard of the TRO?

A. My belief is that that material was in—was (p.36) very close to publishable form if not in publishable form.

Q. When did the Providence Journal, to your knowledge, first know that WPRO or Channel 10—12 had access to the same materials and was ready to publish?

A. I'm not sure when we became aware of Channel 12s use of the material. Perhaps that day, perhaps the previous day, but around that same time.

The Court: The question was, when did you become aware that they had the material, not when they published it.

A. I'm not sure what date I became of aware of Channel 12s possession.

The Court: Sometime before the 13th of November, 1985?

The Witness: Sometime before the 13th, but I'm not sure.

The Court: Would it be days or weeks or months?

The Witness: Perhaps days, close—in that period.

Q. Not weeks?

A. Not that I recall, no.

(p. 37) Q. When were you aware that other segments of the media had access to the same material to form the basis of the publication of November 14, 1985?

A. I was aware sometime before that date, perhaps weeks, again, I don't recall precisely, that the "Hartford Current [sic]" was in possession and had published some of this material.

Q. It was only a short time before November 13 that you became aware that the "Hartford Current [sic]" had published some materials based on airtels?

Mr. Cavanagh: Objection.

The Court: Sustain the objection.

Mr. Curran: If it please the Court, I call to the Court's attention that the "Hartford Current [sic]" published on September 22, 1985.

The Court: The problem is the witness says weeks, as I recall, and you said days. That's where you had the problem.

Q. You are aware that a part of the record in this case now is the "Hartford Current [sic]" publication in the Sunday paper?

A. I'm aware that there's at least one story by the "Hartford Current [sic]" from these airtels in the—that sheet of facts, but I believe just one; and I imagine they published more than one story, (p. 38) although I haven't read others.

Q. And when did you learn of that story that I'm referring to?

A. I'm not—I really don't remember; because I don't know the date of that story.

The Court: - Are you familiar with the story?

The Witness: I've look at that particular story; but I don't remember.

The Court: Does the story refer to Raymond J. Patriarca, do you know?

The Witness: The story I remember seeing refers to Raymond J. Patriarca, yes.

Q. Do you have any knowledge when anyone else, such as Mr. Wyman or others at the Journal were aware that the "Hartford Current [sic]" had published that article?

A. No, but our concern would not have been with the other newspapers; because we had chosen—rather than rush into print, we had chosen to have our reporter

carefully work through all these airtels, pull together the facts on various specific topics and do a very careful preparation of our news stories. We knew that other outfits like the "Hartford Current [sic]" were rushing into (p. 39) print; and we chose not to operate that way.

Q. Do you have any knowledge when the Court learned for the first time of the contents in those materials furnished by the Federal Government to the Providence Journal?

Mr. Cavanagh: Objection.

The Court: Well, I think the record is perfectly clear here, that after some struggle in which I was told it was going to take a couple of months to get the material to me, that I received it. I think that is a matter of record, filing by the Department of Justice.

Mr. Curran: I won't belabor the point, Judge. It's Exhibit 4 and Exhibit 5, the two transcripts both referring to it, I believe.

The Court: It was quite—sometime after the hearing on preliminary injunction, or was it at the hearing on preliminary injunction? Yes I can remember Mr. Sammartino with a box of papers propped up here, so that was the hearing on preliminary injunction. Initially I was told it was going to take months to gets [sic] it.

Mr. Curran: As long as the Court is aware it was November 19, 1985, that you first, or the Court became—had access to the materials.

(p. 40) Q. In your direct testimony, Mr. Hauser, you indicated that to your mind and based on your educational experience and your experience as an editor, that there was no question that this was a Prior Restraint?

A. Based on my education and study and work in the field, yes, my belief was very strongly that this was a Prior Restraint.

Q. And what does that mean to you, a Prior Restraint?

A. Prior restraint means censorship in advance of publication, blocking in advance of publication.

Q. And it likewise means that this censorship also includes orders of the Court relating to the rights of an individual?

A. The order was the censorship.

Q. The order was the censorship. Therefore, it was a Prior Restraint, therefore, you had the right to publish, is that what you're saying?

A. I'm saying my understanding of the First Amendment of the Supreme Courts rulings on the First Amendment are that I am protected from prior restraints.

Q. What rulings are we referring to when we say the Supreme Court rulings? I don't expect you to give (p. 41) the title and verse?

A. I can't cite them. I can't cite a case.

Q. You can't cite a case? And you indicated that it also was of significance to you that this was a clear case that involved materials that we had in our possession and therefore had the right to publish under the First Amendment; is that a fair statement of what you said on direct?

A. We had those materials, yes, we had a right to publish them.

Q. The fact that you had the materials gave you the right to publish, is that what you're saying?

A. No, sir, the First Amendment gave us the right to publish.

Q. And putting it in the context of the original case, you're saying the First Amendment gave you the right to publish materials that related to the rights of privacy of an individual and that were the subject of a protective order of the United States District Court for the district of Rhode Island referred to as a Temporary Restraining Order; is that a fair statement?

A. The First Amendment was certainly overriding any rights to privacy.

Q. And I believe you then indicated in your answers (p. 42) to Mr. Cavanagh's questions, failing to publish would be a clear signal to people such as politicians, members of organized crime, et cetera, that they could appeal to the Court for relief and therefore block publication. Is that what you are saying?

A. I think I said that they could use the Court to block publication of material where timely publication would be essential.

Q. And it's your opinion today, as it was on November 14, 1985, that Raymond J. Patriarca, through his attorney, Mr. Cicilline, was using the Court?

A. As a private citizen, of course, he has the right to use the courts; and he was using the courts.

Q. And notwithstanding the fact that he had the right as a private citizen to use the Court and had in-

deed to appeal to the Court by filing this litigation, you say the Court had no right to protect his rights at least until it had the opportunity to examine the law as it relates to his claim for relief?

Mr. Cavanagh: Object to the form of that question.

The Court: Well, overruled. You may (p. 43) answer the question.

A. I would say that the primary thing in my mind was the overriding importance of the First Amendment.

Q. Your rights were greater than his rights—or the Journal's rights were greater than his rights at that point in time; is that what you're saying?

A. Not my personal rights.

Q. Not your personal rights. We're talking, Mr. Hauser, you as editor and chief and the Journal; and you're saying that editor and chief's rights, Mr. Hauser, editor and chief's rights and those of the Journal were, notwithstanding the order of this court of November 13, greater than Mr. Patriarca's; and, therefore, you could publish?

A. I would say in my opinion that the right to privacy is something very vague and ill-defined, whereas the right to publish under the First Amendment is very clear cut.

Q. Whether the right of privacy is vague or ill-defined, whose function is it to define the right of privacy but the Court's. Is that a fair statement?

The Witness: Would you repeat the statement?

(p. 44) Mr. Cavanagh: Objection. It's a statement, your Honor. I object.

The Court: I'm sorry?

Mr. Cavanagh: It's a statement; it's not a question.

Mr. Curran: It's a statement; and I'm asking him if he agrees with it.

The Court: Why don't you repeat it and put a question mark at the end of it; and we'll get around it that way.

Q. You have indicated that you thought the right of privacy is ill-defined, nebulous, right; is that what you mean?

A. That's my understanding, yes.

Q. And isn't it a fact it would be up to the courts to define the scope of the right of privacy?

A. I understand the courts are in the process of trying to define them.

Q. And this is one of the issues that this Court was confronted with at the time it issued the temporary restraining order on November 13, 1985; isn't that so?

A. That is my understanding, yes.

Q. And you recognize that Mr. Patriarca had the right to ask this Court to define the scope of his right (p. 45) of privacy as it related to materials involved with the government and the disclosure thereof?

A. That's true.

Q. Now, in reaching this opinion, you had discussions, did you not, with counsel, Edwards & Angell; we won't get into the specific particular people but—

A. I did not talk with the lawyers that evening.

Q. You did not?

A. No.

Q. Who did talk with the lawyers on the staff of the Providence Journal prior to the publication?

A. Mr. Wyman consulted with the lawyers.

Q. Did Mr. Wyman relate to you what the lawyers advised him pertaining to obeying the temporary restraining order?

A. Yes, he did.

Q. And what did he say?

Mr. Cavanagh: Objection.

The Court: What do you say to that, Mr. Curran? I suppose the argument is privilege.

Mr. Cavanagh: Yes.

Mr. Curran: Well, is it at that point in time?

The Court: I must say initially I think (p. 46) it is. You tell me why it's not, and I may let you ask the question.

Mr. Curran: I didn't understand the Court's ruling.

The Court: I say my reaction is that it is privileged. This is advice given to a client. But if there's some exception to that, I'll hear you on it. Respect to clients right of privacy in circumstances.

Mr. Curran: I recognize that.

The Court: All right. Sustain the objection.

Q. Now, there was a topic discussed about appeal. You understood there was no right of appeal from this. My questions are directed to the order, Temporary Restraining Order—

The Court: The testimony was appeal was not practical, as I recall.

Q. Is that what your opinion was, that it was not practical?

A. It was not practical or it was futile to attempt to appeal a Temporary Restraining Order?

Q. How did you come about that knowledge?

A. That was from Mr. Wyman.

Q. And before you made the decision that it would go, (p. 47) "We are going to publish notwithstanding the order of this Court," did you consult with counsel concerning whether there were any means in which you could obtain a stay of the order or vacation of the order or whatever, you personally?

A. I did not personally speak with the lawyers. Mr. Wyman is our regular liason with the attorneys; and I respected his opinion and the information he was relaying to me.

Q. And his opinion was such that you couldn't do anything about the Temporary Restraining Order, at least until November 15, when the matter was scheduled for hearing again?

A. My understanding was, yes, that there was no appeal from a Temporary Restraining Order.

Q. Did anyone ever call to your attention that the Court afforded the Providence Journal the opportunity

for a hearing on November 14 rather than November 15 of 1985 concerning this Temporary Restraining Order?

Mr. Cavanagh: Objection.

The Court: Basis?

Mr. Cavanagh: Relevance.

The Court: There's been some talk here of timely publication. Overruled. You may answer (p. 48) the question.

A. I became aware of that much later; but to me that would have been irrelevant; because the crucial thing was not to halt publication under the Prior Restraint for even one edition of "The Journal".

Q. Am I correct correct in concluding that even if the Court said, "We will give you a hearing at midnight of the 13th", you would have published?

Mr. Cavanagh: Objection.

The Court: Basis?

Mr. Cavanagh: Relevance.

The Court: Overruled. You may answer the question.

A. Yes, midnight would have been too late. We would have missed the first edition of "The Journal."

Mr. Curran: Excuse me a minute, your Honor.

The Court: Certainly.

(Pause)

Q. Mr. Hauser, it is not your position that the Temporary Restraining Order issued by this Court on No-

vember 13, 1985, it's not your position that (p. 49) it was unlawful as such; is it?

Mr. Cavanagh: Objection.

The Court: Well, we've had all kinds of legal opinions back and forth here. I'm going to allow it.

A. I would say that I don't have the legal background to answer that question. I consider it a legal question rather than a journalistic question.

Q. Do you consider that legal matters are for the Court rather than for the Providence Journal?

Mr. Cavanagh: Objection.

The Court: Overruled. You may answer the question.

(PREVIOUS QUESTION READ BACK BY COURT REPORTER)

A. I would say in putting out "The Journal" we have to deal with legal questions every day, so certainly legal questions are for us to deal with. I'm simply not competent to answer that one you asked me.

Q. In Exhibit 3 that's attached to the stipulation of facts, and I will tell you that Exhibit 3 is "The Evening Bulletin" publication of Thursday, November 14, 1985, with which I'm sure you're (p. 50) familiar, that exhibit has the headline "Court, Journal Clash Over Use Of Tapes," do you know what the headline writer meant by that?

Mr. Cavanagh: Objection.

The Court: Basis.

Mr. Cavanagh: I don't know how he can say what the headline writer meant by that. He could ask—he could answer what he thinks it means.

The Court: This witness is the executive editor of "The Journal"; isn't he?

Mr. Cavanagh: That's right; and that particular question—

The Court: And I take it the headline writer works for him.

Mr. Cavanagh: The objection, your Honor, goes to the state of mind of the individual headline writer. If he wants to ask him what—

The Court: The question is does he know. He can answer that question. Overruled.

Mr. Curran: Let's withdraw the question.

Q. Mr. Hauser, what does "The Journal" mean in its headline in Exhibit 3, "Court, Journal Clash Over Use Of Tapes"?

Mr. Cavanagh: Your Honor, could the (p. 51) witness look at the headline in the paper?

The Court: Surely.

Mr. Cavanagh: Thank you.

Mr. Curran: Why don't you give him your copy.

Mr. Cavanagh: Okay.

A. The headine writing is sort of a shorthand art; and in this case the comma serves as an "and," so the headine is saying the Court and the Journal are clashing, meaning a dramatic word for disagreeing, over use in this case of publication of the tapes.

The Court: Were there any tapes to begin with?

The Witness: The use of the word "tapes" is, again, a shorthand—

The Court: For what?

The Witness: —term for the airtels based on the transcripts of what were originally tapes.

The Court: The fact of the matter is, there were no tapes; isn't that so; these are summaries made by FBI agents of what was on the tapes?

The Witness: No, sir. I thought they (p. 52) were originally tapes and then they were transcripts and then they were these summaries.

The Court: Have you ever seen a transcript of these these tapes?

The Witness: The tapes and the transcripts were destroyed some years ago.

The Court: This story isn't based on tapes at all.

The Witness: No, but the airtels are based on transcripts which are based on the tapes. It's a shorthand. It's a way we refer to these as "The Patriarca Tapes." The initial material was taped. That was the original form of the material.

Q. And you refer to them as tapes. The court never referred to them as tapes; did it?

A. I don't know.

Q. The Court Order doesn't refer to any tapes; does it?

A. No, not that I know of.

Q. The Journal never had any tapes that were produced by the Federal Bureau of Investigation or the United States Government under the FOIA?

A. No, we asked for the tapes; but we understood that they had been destroyed.

(p. 53) Q. In fact, you had participated in a rather protracted piece of litigation pertaining to the production of these airtels and reports?

A. That was a — in a previous Freedom of Information Act request, yes.

Q. Had gone all the way to the First Circuit Court of Appeals?

A. Yes, that was a previous request, not the one that gave us the tapes in this instance or gave us the airtels.

Q. By the way, Mr. Hauser, based on your experience with the law and particularly with that particular case, one appeals from this court to the First Circuit Court of Appeals in Boston; is that true?

A. That's my understanding.

Q. An hour away; is it not, by travel?

A. If it's in Boston, that's correct.

Q. And Boston is how far away, for the record?

A. Forty-five miles.

Q. Do you know how Mr. Wyman became aware that it would be, or believed that it was impractical or futile to seek any relief by appeal from the order of November 13, 1985?

A. No, I don't know for sure.

Q. But, in any event, he told you that that was so?

(p. 54) A. That's correct.

Q. His belief was that it was so; correct?

A. Correct.

Q. Let me catch another topic, if I might. There's the "Providence Journal" and there's "The Evening Bulletin"; is that true?

A. That's correct.

Q. And each publishes an edition or more on it's own, so to speak?

A. Several editions are published under each name.

Q. Who would have the information as to how many editions there were—how many newspapers were published on November 14, 1985 by the "Providence Journal"?

A. The precise information is kept by our Circulation Department; but normally we do not keep records on a day-by-day basis, but keep — the records are averaged on a monthly basis.

Q. What is the average production for circulation and distribution for the "Providence Journal" on a daily basis?

The Witness: At the present time?

Mr. Curran: Yeah, at the present time.

A. I would say between 90,000 and 95,000 copies (p. 55) for the "Providence Journal" and between 115,000 and 120,000 copies of "The Evening Bulletin."

Q. That includes all editions of both?

A. That would be the net paid — that would be the actual sales of the newspaper. We print more copies than that.

Q. And that's today's average. Would that also pertain to November 14, 1985 as best you can tell?

A. Approximately the same, yes.

Q. Approximately the same. The paper sells for 35 cents a piece, does it, on a daily basis? Maybe you don't know that.

A. I think they're 30 cents. I don't—

Q. Thirty cents?

A. Thirty cents a copy.

Q. Maybe we pay more down in South County.

The Court: This masthead says 35 cents.

The Witness: I don't have to buy a copy.

Q. Mr. Hauser, I'm not going to hold you to that one. Just tell me who I would speak with.

A. The Circulation Department or anybody, the front page—

Q. Whose in charge of Circulation?

A. Howard Sutton is the director of Circulation and Sales.

(p. 56) Mr. Cavanagh: Your Honor, I know you're very familiar with the distribution of the newspaper.

The Court: Probably more familiar than I ought to be. I listened to it at least twice.

Mr. Cavanagh: To help Mr. Curran out, I might just point out that the newspaper sells the papers wholesale to carriers and stores, not for 35 cents.

The Court: I see; that is, whoever buys it pays 35 cents at least. Right.

Q. Mr. Hauser, do you recognize this?

A. Yes, I do.

Q. What do you recognize it as?

A. That's the "Rhode Island Almanac," which is a publication of the Providence Journal Company.

Q. Showing you page 213, without reading it, what does that represent?

A. The figures represent the net paid circulation of "The Journal" and "The Evening Bulletin" and that would be the—a year's average, the year ending March 31, 1984.

Mr. Curran: I just ask that this be marked for identification purposes at this point.

The Court: All right, what do we have?

(p. 57) Mr. Curran: We have a 1985 Journal Bulletin "Rhode Island Almanac."

The Court: This is Prosecution 2?

Mr. Curran: Two for identification.

Mr. Cavanagh: No objection.

Mr. Curran: Unless you have—do you have any objection to it being marked as a full exhibit at this point?

Mr. Cavanagh: Yes.

Mr. Curran: I thought you would.

The Court: Something to take judicial notice of anyway if it's significant.

Mr. Cavanagh: It's irrelevant I think. That's why I also object.

The Court: That's the question. Anything further?

Mr. Curran: I haven't anything further, your Honor.

Mr. Cavanagh: I have nothing further for this witness, your Honor.

The Court: Well, I have a couple of questions. Mr. Hauser, you said that you were in possession of this material lawfully; is that right?

The Witness: Yes, sir.

(p. 58) The Court: And that means that—I take it what you mean is that you obtained it upon request through the FBI and the Freedom of Information Act?

The Witness: Yes, sir.

The Court: Now, you were with the Journal, I take it, in 1979?

The Witness: That's correct.

The Court: And you were familiar with the litigation that went to the Court of Appeals for the First circuit, Providence Journal Company versus The Federal Bureau of Investigation; is that so?

The Witness: I'm familiar with that, yes.

The Court: Are you familiar with the basis upon which the Court of Appeals held that the Journal Company was not entitled to the information at that time?

The Witness: I believe it had to do with the privacy of Raymond L.S. Patriarca.

The Court: Is there anything in the—well, do you think it was just limited to Raymond L.S. Patriarca?

The Witness: I believe so, sir. He was (p. 59) the one that brought action.

The Court: And I take it the Journal was seeking the same information at that time as it sought later in 1984?

The Witness: Yes, sir. After Raymond L.S. Patriarca's death we renewed the request.

The Court: But you were aware that at least insofar as Raymond L.S. Patriarca, the Court of Appeals had ruled privacy was the basis on which the Government justifiably declined to make the material available the Providence Journal?

The Witness: As I recall, that was the Government's position, yes.

The Court: There was, at least in your mind, some definition of what our privacy rights were at that time; right? It wasn't this vague concept; was it?

The Witness: No, except, I would say that was not determined in a court of law but was simply the position of the Government, of the FBI.

The Court: Well, didn't the Court of Appeals hold, or did they, that because of your obstructing Mr. Raymond L.S. Patriarca's privacy rights which arose because the Government had obtained this information illegally in violation (p. 60) of the Fourth Amendment, that this in-

formation would not be made available to the Journal? Wasn't that the case?

The Witness: That's correct. I do recall that, yes, sir.

The Court: So you were aware that information that is obtained in violation of the Fourth Amendment of the Constitution by the Government, the disclosure of that information violates a person's privacy?

The Witness: Only that in that specific case that was the ruling. No, I was not aware that.

The Court: The only difference here is that instead of the Government publishing the information, the newspaper is publishing the information; right?

The Witness: That's correct. But it's a different case and involves a different person. In other words, my understanding was not that the previous case set a standard of privacy for all time, that it only dealt with the privacy of Raymond L.S. Patriarca.

The Court: That the son's rights might have been different than the father's?

(p. 61) The Witness: Yes, sir.

The Court: Now, do you see any problem with a rule that says your government and my government may obtain information in violation of the Fourth Amendment and may make that available to a private citizen or a newspaper and that that information may then be published with immunity; do you see any problem in our society with a rule like that?

The Witness: I don't see a problem with the newspaper making a lawful request for that information regardless of how the Government obtained it.

The Court: Suppose that the Government decided to invent information about anyone here, invent it, and then if somebody requests it, the Government can make it available and that person can publish it?

The Witness: I would say that a responsible newspaper would look very carefully at the material, would attempt to determine its accuracy; and if it felt the Government had manufactured it, no, it would not publish it.

The Court: What did you do here to check that out? Because you didn't have the tapes. All (p. 62) you had was the airtels and the logs.

The Witness: In this case we did work with the materials working with the dates. Our reporter did everything possible to confirm the—connect the events described in those airtels with actual events at the time.

The Court: Are you satisfied with the situation in which the Government obtains information in violation of the Fourth Amendment and discloses that information under the Freedom of Information Act that that information may then be broadcast to the public? Are you satisfied with that.

The Witness: If the Government releases that information, then it can be published, yes, sir.

The Court: This is information which could not be used in a court because it would be suppressed, obtained in violation of the Fourth Amendment, but if the Government takes that material which otherwise would be suppressed in court proceedings and makes it available to a

newspaper under the Freedom of Information Act, then it may be published; right?

The Witness: Yes, sir, I would say the (p. 63) Court proceedings with designed to protect—very carefully protect the rights of a defendant which would not be involved outside a courtrom situation.

The Court: Except for privacy rights.

The Witness: Except for privacy rights, which I think are less well-defined than the rights of a defendant.

The Court: But in this case they were well defined by the First Circuit Court of Appeals with respect to this very material. You say it's for a different person.

The Witness: Yes, sir. I understand it was the same general material, but it was a specifically different person.

The Court: Do you have any further questions?

Mr. Cavanagh: I don't, your Honor.

The Court: You may step down.

Mr. Cavanagh: At this point the defendants would rest subject to the right to argue, your Honor.

The Court: How much do you have, Mr. Curran?

Mr. Curran: I have two witnesses, brief.

(p. 64) The Court: Go-ahead.

Mr. Curran: Want to give us a couple of minutes? Let me call to Court's attention something I failed to earlier. There's a supplemental agreed statement of facts attached to that document.

The Court: Go-ahead.

Mr. Curran: Mr. Cicilline.

JOHN F. CICILLINE (Sworn)

DIRECT EXAMINATION BY MR. CURRAN

The Clerk: State your full name and spell your last name for the record.

The Witness: John F. Cicilline, C-i-c-i-l-l-i-n-e.

Q. Mr. Cicilline, you are a practicing attorney in the State of Rhode Island?

A. I am.

Q. And as such you're also a member of the Bar of the United States District Court of the District of Rhode Island?

A. I am.

Q. In that capacity, are you the attorney that filed a lawsuit on behalf of Raymond J. path Patriarca?

A. I am.

(p. 65) Q. Against the Providence Journal?

A. Yes.

Q. That was filed on what date, if you recall?

A. November 8.

Q. 1985?

A. 1985.

Q. And that is the suit that has a complaint concerned with the privacy rights of the plaintiff, Raymond J. Patriarca, as they relate to materials that you had learned had come into the hands of the Providence Journal?

A. That's correct.

Q. In the course of that litigation, you sought a Temporary Restraining Order from publication—dissemination of printing publication of materials based on those materials that were given by the Government to the Providence Journal?

A. I did.

Q. As a consequence of that prayer for a Temporary Restraining Order request, did you meet with the Court?

A. I did.

Q. What was the date?

A. November 13, 1985.

Q. Where did it take place?

(p. 66) A. In Judge Boyle's chambers.

Q. What time of day do you recall did it take place?

A. It was the afternoon, that's all I member.

Q. At the time were you engaged in litigation or trial elsewhere?

A. No.

Q. You were not. But it was in the afternoon as you best recall?

A. I believe so.

Q. Can you establish whether it was at 1 o'clock or 2 o'clock or any other time without my suggesting when it occurred?

A. I really don't. I believe it was noontime; but I'm not sure of that.

Q. Do you know yourself whether the Court had something pending here in this courtroom at that time?

A. I don't.

Q. But, in any event, you were contacted and did attend a meeting with the Court?

A. Yes, sir.

Q. Who else was present, if you recall?

A. Mr. Hindle, Mr. Cavanagh, Mr. Medeiros. Those are the only ones I remember specifically.

Q. Mr. Hindle, Mr. Cavanagh, and Mr. Medeiros are all (p. 67) members of the firm Edwards & Angell?

A. I believe so.

Q. And they were appearing on behalf of?

A. They were appearing on behalf of the Providence Journal and one of the of the television stations.

Q. WJAR, Channel 10?

A. I believe so, yes.

Q. Who represented the United States Government, if anybody?

A. I believe both Mr. Almond and Mr. Sammartino represented them and were present.

Q. At that conference, did the Court inquire of you what the nature of the cause of action was on behalf of Raymond J. Patriarca?

A. We had some discussion about it; but I'm certain the Court was aware of what the nature of the action was; because the papers had been filed, I believe some five days earlier?

Q. I didn't hear all of that?

The Court: He said he believes the Court was aware of the nature of action because the papers had been filed some five days earlier.

Q. And had you filed any additional papers in the meantime before that meeting?

(p. 68) A. I don't believe so.

Q. Was there a discussion as to whether the Court should issue a Temporary Restraining Order?

A. There was.

Q. Was there opposition expressed by counsel for the Providence Journal?

A. There was.

Q. Were both parties—just these parties, Mr. Patriarca's lawyer, you, and Edwards & Angell heard by the judge as to their respective positions on the issuance of that order?

A. Yes.

Q. Mr. Sammartino or Mr. Almond on behalf of the United States Government, were they too heard on whether such an order should issue?

A. Yes.

Q. Was there any discussion as to if the order did indeed issue, when the Court would address the question of a preliminary injunction?

The Witness: Was there discussion?

Mr. Curran: At that time, yeah.

A. Yes.

Q. And was it the intention of the Court as expressed at that conference that if the Court did issue an order on November 13, 1985, it would give the (p. 69) parties a quick hearing as to whether it would also issue a preliminary injunction?

A. Yes. I believe both sides were surprised that the judge's ruling was stated so quickly. I pointed out to the Court that I had a matter that was supposed to be reached on the following morning before Judge Kiely but I would contact Judge Kiely to work that out. I believe counsel for the Journal and Channel 10 indicated that they needed more time to properly address the issue than the following morning; and the judge on the basis of that, in my opinion, continued it an additional day or several days.

Q. Am I correct in my understanding that the Court indicated it would hear the parties on November 14, 1985 on your prayer for a preliminary injunction on behalf of Raymond J. Patriarca?

A. That is correct.

Q. And as far as you know, at the request of counsel for the Providence Journal, it was scheduled for November 15 rather than November 14?

A. It was scheduled because the Court was accommodating everyone. The Court was willing to hear it the following morning; and I believe counsel indicated that that was too short a notice (p. 70) to prepare for such an argument.

Q. You, on behalf of Raymond J. Patriarca, did not ask that it go over to November 15; did you?

A. I don't know what words I used; but I certainly didn't have any objection to it; because I, too, wanted the additional time.

Q. But you were—you did indicate to the Court that you probably could straighten out your attendance before Judge Kiely on that matter and be in attendance on November 14 if the Court so required?

Mr. Cavanagh: Objection.

The Court: I suppose the objection is it's leading.

Mr. Cavanagh: Yes, your Honor.

The Court: I'll sustain the objection but I must say I'm not sure it's going to do any good. Let's have the next question.

Q. What did you indicate to the Court as far as November 14, 1985 was concerned?

The Court: Did you indicate to the Court what Mr. Curran just said?

A. Yes, I did.

Mr. Curran: You see. I've learned the hard way.

(p. 71) The Court: Go-ahead.

Q. What did you indicate to the Court concerning November 14?

A. I believe I was suppose to begin a trial the following morning.

The Court: He said he's going to get in touch with Judge Kiely.

Mr. Curran: The Court remembers that.

The Court: No, I just heard him say it. Go-ahead.

Q. Proceed.

A. I indicated that I would get in touch with Judge Kiely to explain to him I'm required here and I was certain he'd allow me to come.

Q. Do you recall if at that meeting in chambers with Chief Judge Boyle, whether the Providence Journal attorneys who you have mentioned raised the question of Subject Matter Jurisdiction?

A. No, I don't really remember that specifically.

Q. You don't really remember that?

A. Specifically, no.

Q. Do you remember whether they argued to the Court about Prior Restraint of their right to publish the materials?

(p. 72) A. There was some discussion of that, yes.

Q. That was discussed?

A. Yes.

Q. Did they address in any of their discussions with the Court the privacy right of your client, Raymond J. Patriarca, as it related to this Prior Restraint?

The Witness: Did counsel for the Journal discuss that?

Mr. Curran: Yes.

A. I don't believe so.

Q. You certainly did.

A. I believe so.

Q. As a consequence of the meeting, a Temporary Restraining Order did issue?

A. Yes.

Q. And scheduled a further hearing on the prayer for preliminary injunction for November 15, 1985?

A. That's correct.

Q. 1985?

A. Yes.

Q. And there is no question in your mind that the Providence Journal was represented and was aware of the issuance of that order?

A. There was no question.

(p. 73) Q. Who prepared the order, by the way?

A. The order was prepared, I think, in advance. I think Judge Boyle at that time hand wrote an amendment to it. The handwritten—the addition to the typed motion was signed by Judge Boyle. I believe it was copied in the courthouse and copies were distributed. I don't know whether they were distributed that night or the next day; but they were distributed.

Q. Referring to what I've designated as Exhibit 1 in the stipulation of facts, is that a copy of the order?

A. It is.

Mr. Curran: No further questions.

CROSS-EXAMINATION BY MR. CAVANAGH

Q. Mr. Cicilline, you recall the attorneys for the media at that conference discussing and arguing to the judge that this injunction you were requesting was a Prior Restraint; correct?

A. I do.

Q. And do you recall them pointing out to the judge that there was no interest argued by your side of the case that would justify a Prior Restraint; correct?

(p. 74) The Witness: Do I recall if you were arguing that?

Mr. Cavanagh: Yes.

A. Yes. Yes, I do.

Q. Did I argue that?

A. I don't know whether you did, but someone did.

Q. Is your memory of that conference clear?

A. Not really.

Q. Do you know if I was there?

A. I believe you were.

Q. If I suggested—

A. I'm sorry, you were not. You were not. It was Mr. Medeiros who did most of the talking.

Q. And do you remember what you argued?

A. There was a discussion over whether Freedom of Information Act appeals could be taken in this fashion. I believe the Government felt very strongly about that situation. I remember discussion about—the judge pointing out that although the administration had changed and that there had been some other policy changes, that the Constitution had not changed; and it seemed to me that the issue centered on whether a few hours to reflect on the matter or not would solve it. The (p. 75) judge wanted some some time to think about it, wanted some time to see

some law in the cases, thought we'd all agree that that would and I remember the substance, the judge saying, look let's get some law on this, let's make a decision what it's about it. I didn't feel very strongly that we would ultimately prevail. It was a holding pattern as far as I concerned as far as the Court.

Q. In fact, you were surprised that you even got a Temporary Restraining Order; weren't you?

A. I was.

Q. And, Mr. Cicilline, at no time did the lawyers for the Providence Journal indicate that they would consent to the issuance of this order; did they?

Mr. Curran: Objection, your Honor. Whether they consented or not at that time is irrelevant.

The Court: This is cross-examination. Overruled. You may answer the question.

A. They did not.

Q. In fact, from what you remember, they were very clear in their arguments that this would be a Prior Restraint; right?

A. Yes.

(p. 76) Q. And you mentioned earlier that there was a discussion about the Freedom of Information Act and appeals from it and Mr. Sammartino raised the question that the Court didn't even have jurisdiction under the allegations that you had made in the complaint; didn't he?

A. He did.

Q. And you, in fact, were resting on your papers, the ones you had filed, and assumed the Court would be familiar with prior to the conference; correct?

A. Yes.

Mr. Cavanagh: Thank you.

REDIRECT EXAMINATION BY MR. CURRAN

Q. And, Mr. Cicilline, it was clear to you, was it not, from the remarks made by the judge at the meeting, that he recognized what we were discussing here, or you were discussing here a question of a Prior Restraint on the First Amendment rights of the the Journal? He recognized that; did he not?

A. He did.

Q. He also recognized that you were concerned with the rights of Mr. Patriarca, his rights of privacy as you spell them out in the complaint?

(p. 77) A. Yes.

Q. And, in fact, all he asked for was a little time to give due consideration to the clash of the so called Fourth Amendment rights of your client and the First Amendment rights of the Providence Journal?

Mr. Cavanagh: Objection. The Court didn't ask for anything. The Court entered an order.

The Court: What do you say to that?

Mr. Curran: I wasn't there, your Honor.

The Court: All right, sustain the objection.

Mr. Curran: Sustained?

The Court: Sustained.

Mr. Curran: Thank you.

Q. As a result of the remarks of the Court, was there any doubt in your mind it was aware when it issued this Temporary Restraining Order that there was this clash between the rights of your client and the rights of the Journal?

A. I believe the judge indicated that he recently attended some kind of a conference that had to do with this new conflict and indicated to us that it was an immerging conflict that might (p. 78) supersede the fight between the First and Sixth and discussed that at some point that was the seriousness of the problem.

The Court: The first and the sixth?

The Witness: As serious as the First and the Sixth.

Mr. Curran: Could have been the Fourth.

The Witness: It was as serious. The First and the Fourth problem is as serious as the First and the Sixth problem; and it was—there was a discussion about that.

Q. And there's no doubt in your mind that both sides were asked to come to court on the 15th and bring some authorities to try to assist the Court in making a determination on the prayer for preliminary injunction?

The Witness: I'm sorry. I didn't understand that.

(PREVIOUS QUESTION READ BACK BY COURT REPORTER)

A. There is no doubt that the Court asked that.

Mr. Curran: No further questions.

Mr. Cavanagh: No further questions.

The Court: All right, you may step down. How long is this next witness going to take?

(p. 79) Mr. Curran: Just a moment, your Honor.

Mr. Curran: I have one question of Mr. Sammartino whose here under subpoena.

EVERETT SAMMARTINO (Sworn)

DIRECT EXAMINATION BY MR. CURRAN

Mr. Curran: If I said one, would you give me a couple?

The Court: That means two.

Mr. Curran: The Court is aware that he's assisting the United States Attorney.

The Court: We will take judicial notice of that.

The Clerk: State your full name and spell your last name for the record, please.

The Witness: My name is Everett Sammartino, S-a-m-m-a-r-t-i-n-o.

The Court: And your occupation?

The Witness: I'm Senior Assistant United States Attorney.

Q. Did you attend a meeting on November 13, 1985 relative to the case of Raymond J. Patriarca versus the Providence Journal, the FBI and others?

A. I did.

Q. What time of day was it that that took place?

(p. 80) A. I recall it being about 12:30 p.m. I had had a conflict, slight conflict because I had a prior meeting with Judge Selya; and I asked Mr. Almond to cover me until I was able to appear before Judge Boyle. Judge Selya finished his meeting prior to the 12:30; and I made it to the 12:30 meeting with Judge Boyle.

Mr. Curran: No further questions.

Mr. Cavanagh: I have no questions.

The Court: All right, you may step down.

Mr. Curran: Thank you. We rest, your Honor.

The Court: All right, do you have anything further?

Mr. Cavanagh: Not by way of evidence, your Honor.

The Court: All right then, we'll take a recess; and I'll hear you after the recess. Court will be in recess for a few minutes.

(RECESS)

Mr. Curran: If it please the Court, Mr. Cavanagh is going to argue; but before he does, I would like to indicate we're not resting the case in its entirety. In our brief I've indicated that the petitioner requests that we be allowed to (p. 81) present evidence as may be appropriate of respondent's financial circumstances at a later date. Whether we have to do that, I suppose is depending on what the Court rules.

In addition, I'd ask that we have marked as a full exhibit the editorial pertaining to the Pawtucket matter, Exhibit No. 1.

The Court: What's the reason for that?

Mr. Curran: What is the reason for marking it as a full exhibit?

The Court: Yes. How is it relevant here?

Mr. Curran: I think it shows that the Journal will take a position on a matter that suits it at the time; and I think as we will argue later, I think that's what it's position was there; and whether it has another position here is a matter for argument. I think there's material in there that's relevant.

The Court: I think it's just a little too collateral for me to do get into at this point. I'll let you mark it for identification.

Mr. Cavanagh: Your Honor, it was difficult for me to think of an appropriate way to start this argument. I guess I should say that (p. 82) the special prosecutor's brief started off with the statement, "This is a simple matter." I will say to you it is not a simple matter at all. I think you know that. And that's my first point, that this case represents, I think, a classic conflict between strong rights; and the Providence Journal represents the newspaper, but in a larger sense it's position in this case involves the right of free press and really in a sense it represents the right of all people under the first amendment. In some senses a newspaper has a peculiar situation because they've [sic] involved in publications all the time; but the first amendment is for the people and for many years it's been recognized—

The Court: So are the other nine.

Mr. Cavanagh: That's right. And the other interest which is here is the—is your interest, and not you personally—

The Court: I don't have an interest in the case.

Mr. Cavanagh: That's right. You have an interest in the institution of the Court, the institution of judiciary; and I guess what I'm suggesting is that that's the level I think this (p. 83) case ought to be treated on, not The Journal versus the U.S. District Court Judge Boyle, but the question of the judiciary and a court order and the right of the free press.

The Court: Let me get into this without taking a lot of time; because it seems to me this gets right to the heart of the problem. I've read the briefs, of course. It seems to me that what the defendant Journal is claiming here is that under no circumstances and at no time may a Court restrain a newspaper from publishing anything except with respect to troop ship movements apparently. In Nia (sic) versus Minnesota, is that the argument that there is never a time or a circumstance which can rise under which a—the newspaper can be restrained from publishing anything?

Mr. Cavanagh: —Information--

The Court: Apart from secret government information and apart from obscenity.

Mr. Cavanagh: That's right. Apart from those exceptional situations which have been recognized in the cases and clear and present danger, danger to the society at large, clearly exceptional circumstances, and, of course, when (p. 84) the information has been lawfully obtained. If there was a particular crime—

The Court: You cite a case in which the information was obtained by a reporter breaking and entering into

somebody's premises, and the D.C.—was it D.C. Circuit, or the district court down there said they could use it.

Mr. Cavanagh: That's right.

The Court: You rely on that. It isn't that the information was rightfully or wrongfully obtained.

Mr. Cavanagh: You may disagree with that; and that isn't our case cause. We didn't do that in this case.

The Court: What do you say about the First Circuit's decision here? I don't want to get into the merits of the case; but we get right back to Judge Coffins opinion where it isn't too terribly clear that he's saying "This information is barred by the Freedom of Information Act or is barred a Fourth Amendment privacy right," but at least the opinion admits of that construction. All right. Now, what do you say to a situation where there is a possible construction that as to this party it has been denied this information by (p. 85) a court after consideration for the privacy issue, that upon an application of this sort, that that isn't different from the so called "pure speech case" that you talk about, like a baseball score or something like that?

Mr. Cavanagh: That would be the position, your Honor, you're saying this really isn't a prior restraint because there's been a court order already issued, that as a matter of law these documents can never, ever be given to anybody; and I respectfully say that that is not what that case stands for—

The Court: I agree. I agree that there is the argument that that is not what that case stands for; but you have to agree that it is possible that case does stand for that proposition. And if it does, then where does it lead

you? Is this the pure speech case; or is a case where the a court has already decided that the Providence Journal Company cannot have this material?

Mr. Cavanagh: It isn't; and that was—

The Court: I heard your construction of that; but I have some trouble finding the language in it that says that. All right.

(p. 86) Mr. Cavanagh: Your Honor, on that Wednesday afternoon, I suggest that what should have happened was that the order should have been denied; because—and that is because this case clearly called into question pure speech and a prior restraint. And the argument—

The Court: And the formula is pure speech equals no prior restraint, period, exclamation point?

Mr. Cavanagh: No, the scale indicates that pure speech, prior restraint puts that scale down to here, and what you put on the other side of scale has to be very, very heavy. And what was put on in this case was something that didn't even move the scales. In fact, Mr. Cicilline was rather candid, he was very surprised he prevailed. Now, I understand the problem the Court has.

The Court: That happens to lawyers all the time.

Mr. Cavanagh: But in this case it's interesting I think; because it really—it goes right to the dilemma, if you will, that the Providence Journal faced.

The Court: What's the dilemma?

Mr. Cavanagh: The dilemma that is if it (p. 87) is a prior restraint, which they honestly—and I think no one

can question that, that they honestly believed it was—then what was happening is they were losing their First Amendment rights by the minute.

The Court: Is it your contention that the "New York Times" lost its constitutional rights by the minute in the Sullivan case?

Mr. Cavanagh: You mean the Pentagon Papers case?

The Court: The Pentagon Papers case. Because the Times did not publish while that matter was under consideration by the Court?

Mr. Cavanagh: That's right.

The Court: Was that a prior restraint?

Mr. Cavanagh: And that was a case where the national security and the implications thereof were on the scales and they made a judgment that under the circumstances they would abide—obey the order because this was a closed case.

The Court: So who makes the decision that Mr. Curran is pointing out here the publisher or the Court?

Mr. Cavanagh: Well, in the "New York Times" case the Court made a decision—

(p. 88) The Court: They restrained it; didn't they?

Mr. Cavanagh: That's right.

The Court: All the way through, until the Supreme Court decided the case.

Mr. Cavanagh: Well, actually, in the lower court the Times won. It was only the Second Circuit to the Supreme

Court; but they made the judgment; and the point is that the circumstances were such that that was not one which was obviously a prior restraint. It was a very close question; and the New York—Under all of those authorities. And the Government's argument in the Pentagon Papers was that national security and the implications related to that were at stake; and the "New York Times," "Washington Post" I'm sure were aware of that.

In this case, we don't—was there anything that close? Not at all. There wasn't. What it was was that there was an interesting, and I agree, somewhat new, question of privacy, the future of privacy which I understand you attended a conference on, and it was in those circumstance that you did that. Now, what I believe should have been done if the First Amendment had been (p. 89) followed through—

The Court: Let's get that straightened out; because at the time I was sitting right next to Mr. Medeiros at lunch in a hotel in San Juan and Arthur Miller was speaking to all of the judges of the First Circuit plus about 800 lawyers; and the topic of his discussion, which lasted for about an hour, was the emerging clash between the Fourth Amendment and the First Amendment. And he started out by observing that a marine who had prevented President Ford, I think it was, from being assassinated was a national hero for three days until someone published a story that said that he was a homosexual; and the question was whether that aspect of the story ought to have been published. This is what Miller's discussion was.

Mr. Cavanagh: And the answer to that would be, if it shouldn't have been published, there would be a judg-

ment in money damages for him, not a prior restraint of the publication about the fact that he was a homosexual.

The Court: Professor Miller being Professor Miller didn't give any answers to the question.

(p. 90) Mr. Cavanagh: Right. You fortunate or unfortunate enough, were able to come back and have a firsthand experience with this.

The Court: That's right.

Mr. Cavanagh: Again, your Honor, my point was and what should have happened, I respectfully suggest, that is the temporary restraining order should have been denied; and then the people who had the First Amendment right to decide to publish without a direct order telling them not to, without—where they make the editorial judgment. And that's the problem. That's the dilemma they were in. I know Mr. Curran will get up, "What was the big rush? Why did you have to do this?" Because in fact they were going to miss one cycle of publication under a Court Order which they believed infringed and violated clearly their First Amendment rights. That's an important precedent, an important principle.

The Court: Your premise is that at no time, under no circumstances given this situation, even involving a violation of one of the Bill of Rights; one of the provisions of the Bill of Rights, that a Court may restrain a newspaper from (p. 91) publishing at least to give it time to find out what the law is; right?

Mr. Cavanagh: That's right. That's right. And, in fact, that, number one, that the Fourth Amendment right was not even alleged with respect to the Providence Journal. The only claims were that this was an FOIA appeal

and this was an Omnibus Crime Control Act. The Fourth Amendment was mentioned; but that was not a basis for jurisdiction at all before you. The point is, it involved the Patriarca tapes, it involved—

The Court: I don't want to get too far into this; because there's no transcript of that conference. But I have a rather clear recollection of being told that the Freedom of Information Act was explicit with respect to restraints, that under the Freedom of Information Act, the Court had no jurisdiction to do anything; and my recollection was, and it may be defective, but my recollection was it didn't seem to me that the Freedom of Information Act had changed the Constitution or the Fourth Amendment. I think that was the discussion.

Mr. Cavanagh: Your Honor, the Fourth Amendment was not alleged as a ground by this (p. 92) Plaintiff.

The Court: It's in the complaint.

Mr. Cavanagh: I know, but not—it's just mentioned. And that's very important; because when you put on the scales, you don't have a the exceptional circumstances. And and so what happens and why are we alleging that there shouldn't be any contempt in this case? I think it's because it's a classic confrontation; and it's a situation where when looked at, the First Amendment is paramount; and it's difficult because the public perception of the First Amendment's primacy, if you will, in this instance is that it looks like the newspaper can do whatever they want. Now, that isn't—in truth, I don't think that's what you know this case stands for. It does not stand for that. This case stands for a unique, I would say rare, situation where the First Amendment and the administration of justice

and dignity for the Court clash. And you at one point said that your concern was for the public perception of this; and the Providence Journal shares that concern. And that, of course, brings us right back into the clash. In no way are they delighted to be in this circumstance. No way were (p. 93) they delighted to be deciding on that Wednesday night whether or not to follow this Court Order under the circumstances or do what they thought was what they had to do journalistically, not only for themselves, but for newspapers not only presently but in the future; and I know you're familiar with that tradition and that is what this case represents. And the problem of this case is—

The Court: There's no future for this kind of a case; is there? Isn't it very clear under the Omnibus Crimes Act that you cannot do this sort of thing now?

Mr. Cavanagh: Under these particular circumstances?

The Court: Yeah, it's very clear that Congress has made it a felony; and anybody who uses or discloses this information is committing a felony. That's at least been a law since 1968. The only way that this situation can possibly escape that, if it does, and it's not too terribly clear that it does, is it was because the recording was made before 1968, and for no other reason; and the problem with that is that the First Circuit, when it considered this case the first time out, knew that the conversations took (p. 94) place between 1962 and 1965 and still got into an application of the Freedom of Information Act. So it may apply; and it may even be a felony now.

Mr. Cavanagh: That's right; and anyone who commits that felony pays the price.

The Court: Congress is expressing a public policy which says, that if the Government collects information in violation of somebody constitutional rights, nobody can use it.

Mr. Cavanagh: What it says is, if you use it, you will be penalized for the consequences of it; and there's the difference. And earlier, when you asked Mr. Hauser some questions about does he think they can do it with impunity. He believes that the newspaper under the First Amendment can publish with impunity but pay the consequences; and that's all we're talking about. It's the prior restraint that's the problem here. I mean they —

The Court: Isn't there a prior restraint right now?

Mr. Cavanagh: What?

The Court: Isn't there a prior restraint right now?

Mr. Cavanagh: Against the Government, (p. 95) not against the media.

The Court: Under the statutes, there's not prior restraint?

Mr. Cavanagh: They'll go forward with a felony charge, a crime against them.

The Court: All right. That is not a prior restraint?

Mr. Cavanagh: There's a difference.

The Court: I see.

Mr. Cavanagh: On the privacy rights that Mr. Patriarca claims, he has a remedy. If he claims he's been defamed or his privacy's been invaded.

The Court: All right, this is akin to saying it's perfectly all right to take somebody's life so long as you be punished for it.

Mr. Cavanagh: I don't think it is at all, your Honor; because the First Amendment principle, which makes pure speech unique, is that unless we have highly unusual circumstances, the remedy for the publication is after the publication. And I started to refer to this as a very rare case; and I think you're right. It's rare for that reason, the fact that the Omnibus Crime Control Act may deter people from doing (p. 96) that. It may even deter the Government in the future. In any event, this is a case which doesn't ask to go on to new ground at all; it asks you merely to emphasis that the line is drawn there and that's where the line should be drawn and that prior restraints and pure speech, unless in exceptional circumstances, none of which apply here, are inappropriate and invalid and, therefore, the good faith violation of such an order should not be punished by criminal contempt. And the challenge, if I may, for this Court is that it was your order personally; and the problem with it is that we're not dealing in the ideal world, which I think if we did, if we dealt in the perfect world, I suggest to you intellectually if you put up the First Amendment interest in this case against the administration of justice and the interest to be protected, the First Amendment interest would prevail, it would; and that's the challenge for you in this case. How to explain that and take care of the First Amendment interest and not set a precedent that a newspaper that does violate an order in good faith under these circumstances is subject to criminal contempt; because by doing that, there is the chill on the (p. 97) First Amend-

ment rights right there, that's the problem with going in that direction. How it is explained is something that I'm sure you would be able to do; but the problem is there's a principle here; and it's the First Amendment right; and it may sound arrogant, it may seem arrogant; but it's not done so for that reason. It's in very important interest; and I think this case is rather clear when we look at the authorities. And I understand very much how quickly everything had to be done; and the fact that after reflection the order wasn't kept in force. The problem is it had to be done by the "Providence Journal," they made the decision under the First Amendment. When now analyzed, I believe that that First Amendment right is paramount; and there certainly was no criminal intent involved at all. And the suggesting that this was flaunted at the Court, I would hope you wouldn't take that seriously.

The Court: Wait just a minute on that. There's a statement here on behalf of the Journal which states, the fourth a paragraph says they're not — all right, go-ahead.

Mr. Cavanagh: Your Honor, the choice in this case should have been the newspapers whether (p. 98) to publish or not; and they should not have been under the cloud of a prior restraint; and that's the problem. I respectfully ask you to consider this question and deal with it in a way that might take care of the public perception but clearly protects the First Amendment right of the newspaper. It's a very serious question. The precedent that could come out of this is such that it goes beyond this case; and I truthfully believe that this Court is aware of that problem.

Mr. Curran: If it please the Court, I'm not going to read from these materials; but I just want the Court to

know that notwithstanding the fact that all of the law that's involved in this case comes to that much, it's still a simple case. Mr. Cavanagh has argued that what should have happened, you not enter the order for temporary restraining order, possibly would have resolved the whole thing. Well that isn't what happened; and that's why we're here today. What did happen is what makes this case a simple case. This Court entered an order. This court was confronted after hearing counsel on all sides with a situation in which one of the party defendants, the Providence Journal had gone to great lengths to go to the (p. 99) First Circuit Court of Appeals after hearing before Judge Pettine to acquire the materials described as airtels, reports and other materials reporting on illegal wiretaps by the Federal Bureau of Investigation; and in doing so, it was aware of the fact that the Appelate Court, our First Circuit Court of Appeals, granted a stay, nothing would be divulged because we will preserve the status quo so that the rights of anyone involved in the conversations that were heard illegally would not be impinged upon. And Judge Campbell, after Judge Pettine had indicated "I would grant a short stay only so that you can go to the Appelate Court and see what they have to say about it," Judge Campbell, for the Court, granted a stay; and the Court recognized that in the circumstances it was proper.

The Court: Where was that, they recognized it was proper? Was that argued at all?

Mr. Curran: It was not really argued.

The Court: It was an application made to the Circuit after Judge Pettine refused a stay and they granted it. But there wasn't anything in the opinion that there was discusses propriety to stay?

(p. 100) Mr. Curran: No. But the fact is that the Court should be afforded the opportunity to determine, one, whether there is a conflict between Fourth Amendment rights and First Amendment rights, whether there is something here that the Court should be aware of, that there are rights on both sides of the case, so to speak, that someone isn't appealing to the Court on a frivolous brom.

Now, all of the cases that deal with these prior restraints vary. There is not a factual case that we could find that is similar to this one; but there is a pattern that the Court is aware of I'm certain that where the Government, such as the executive branch, seeks to impose a prior restraint or prohibition in its entirety because of secretive materials or whatever that will be looked at closely, that the "New York Times" and the "Washington Post" were entitled to a close examination by the Court as to whether their rights were being infringed upon. Now, there, if you read the comments of the justices that wrote opinions, the Court, so to speak, restepped the system so that none of the materials would be divulged; but "We'll sit if we have to at (p. 101) midnight and hear you." They even stopped a trial so that the matter could go right to the Circuit Court of Appeals and ultimately the Supreme Court. Now, and the Chief Judge was critical of the fact that more time wasn't given —

The Court: Chief justice.

Mr. Curran: I'm sorry I'm in the wrong jurisdiction. Was critical of the fact that you didn't even give us a record that we could ask questions of counsel. Counsel didn't even know what the materials were about. That's significant; because this Court did not know on November 13, 1985 what it was dealing with. There were no reports given to this Court by the Federal Bureau of Investigation or the "Providence Journal," nor were any copies given to Mr. Patriarca so that he could examine whether or not any of his rights were involved.

I ask the Court to assume for the purposes of this argument that there was evidence of criminal activity involving the plaintiff, Raymond J. Patriarca on the tapes, if there was just — it certainly was not published, I'm not saying that; but assume that there was, the threat would be that if it's published, his (p. 102) constitutional rights to claim the Fifth Amendment would be aborted. It would become a matter of public knowledge if there was indeed evidence on that material of criminal activity. Whether that Court had that in mind, I don't know.

The Court: How does that affect his Fifth Amendment rights?

Mr. Curran: It may not. I'm just saying that once the matter becomes public and he has a Fifth Amendment right, it's not worth a heck of a lot if it's out there in the community and some of the members of community may be jurors. Now, whether this Court —

The Court: The problem with this case is that under these circumstances the Government can obtain information illegally and can use it any place but in court. They can't use it in court. That's perfectly clear. But they can use it any place else they want to. They can pass it out on the street corner. That's the problem with it.

Mr. Curran: All right.

The Court: Whether that's a sound policy or not is something somebody's going to have to address most assuredly.

Mr. Curran: That comment by the Court I (p. 103) need not pusue [sic] this point further because the Court was well aware this was a problem; and the Court should have had the opportunity to examine into whether or not Mr. Patriarca's rights were going to be involved or whether the FBI was doing the right thing or whatever and not in the course of its deliberations have a party to the restraining order violated. And after acting in its capacity as judge of its right to publish do so in violation of this Court's order; and that's why it's a simple case, your Honor. And we ask that the defendant be found in contempt of the order — violation of the order.

The Court: I shouldn't ask for this; but if you want some brief rebuttal, I'm prepared to permit it.

Mr. Cavanagh: I don't.

The Court: I don't suppose anyone has a case that considers specifically the question of the First Amendment application to the Fourth Amendment with respect to illegally obtained material?

Mr. Cavanagh: If we had, we would informed the Court of it.

The Court: All right, let me know if you (p. 104) find one.

Mr. Cavanagh: The only other point is I think it might be irrelevant; because I don't think a Fourth Amendment interest is involved or it wasn't at the time you entered the order.

The Court: All right, the Court will take the matter under advisement. Be in recess.

(ADJOURNED AT 12:30 P.M.)

(Reporter's Certification Omitted)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA	)	
	)	
vs.	)	C.A. NO.
	)	85-0707-B
FEDERAL BUREAU OF	)	
INVESTIGATION, ET AL	)	

STIPULATION

(Received March 25, 1986)

In the above-entitled cause it is stipulated and agreed for the purposes of the contempt proceedings against respondents Providence Journal Company and Charles M. Hauser that:

(1) The net worth of respondent Providence Journal Company is in excess of $1,000,000; (2) the net worth of respondent Charles M. Hauser is in excess of $250,000; and (3) the respondents will not contest the imposition of fines, if any, on the ground that the Court did not have sufficient evidence concerning the financial status of the respondents.

/s/ William A. Curran
Special Prosecutor

/s/ Edward F. Hindle

/s/ Joseph V. Cavanagh, Jr.
Counsel for Respondents
Providence Journal Company and
Charles M. Hauser

Dated: March 25, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA	)	
	)	
PLAINTIFF	)	
	)	CIVIL ACTION
v.	)	NO. 85-0707B
	)	
FEDERAL BUREAU OF INVESTIGATION	)	
and	)	
WILLIAM H. WEBSTER, DIRECTOR	)	
and	)	
UNITED STATES DEPARTMENT OF JUSTICE	)	
and	)	
EDWIN MEESE, ATTORNEY GENERAL	)	
and	)	
THE PROVIDENCE JOURNAL COMPANY	)	
	)	
	)	
IN THE MATTER OF APPLICATION TO ADJUDGE THE PROVIDENCE JOURNAL COMPANY AND ITS EXECUTIVE EDITOR, CHARLES M. HAUSER, IN CRIMINAL CONTEMPT	)	MISC. NO. 86-003B

ORDER

The Providence Journal Company and its Executive Editor, Charles M. Hauser have been found guilty of criminal contempt. The parties have been heard with respect to an appropriate penalty.

The offense is serious. The Providence Journal Company has chosen to defy an appropriate Court Order and boldly communicate that defiance to hundreds of thousands of residents of this area. The penalty must be substantial.

There are circumstances which suggest mitigation. Most significant is the damage which the Providence Journal Company has managed to inflict upon itself. It has succeeded in tarnishing its image as a law abiding institution, perhaps irretrievably. It has managed by its own efforts to seriously impeach its future credibility. This is indeed an unfortunate occurrence because so much depends upon the communication of information and views which are both believable and trustworthy.

Of lesser significance, but entitled to be weighed in the balance, is the fact that although a series of articles concerning the so-called "Patriarca Tapes" have been promised, only one article has been brought to this Court's attention. It appears that upon reflection, a decision was deliberately made not to make a bad situation worse.

The circumstances are quite unlikely to be repeated in the future. The Court is satisfied that the zealous First Amendment bias of the Journal Company is real though in this instance seriously misguided. True freedom requires that each person respect the rights of all others. A violation of any person's freedom diminishes the freedom of all.

In substance, the offense is a mistake in judgment conditioned by a mistaken but sincerely held belief in the righteousness of its action. Defendants actions were

wrong and the wrong must be righted as best it can. There is no totally satisfactory remedy. There is no practical way to turn back the clock and to restore things as they once were.

The purposes to be served are stated in *United States v. Mine Workers*, 33 U.S. 258, 302-303 (1947):

> Sentences for criminal contempt are punitive in their nature and are imposed for the purpose of vindicating the authority of the court. *Gompers v. Bucks Stove & Range Co., supra,* at 441. The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and willfully refuses his obedience, does so at his peril. In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future.

The wrong was repeated more than 200,000 times. The Journal's publication sells at retail for .35¢ per copy. Additionally it receives advertising revenues. A penalty of .50¢ per copy is reasonable, and therefore a fine in the amount of $100,000 to be satisfied within 60 days is imposed against the Providence Journal Company.

Mr. Hauser, according to the evidence, was a principal actor. Others were involved but are not now before the Court. Although a jail term is permitted in the circumstances, because of the involvement of others, Mr. Hauser

might be perceived as a victim. Furthermore, a jail term would not serve a truly constructive purpose, would result in public expense and would not be as beneficial to the public as other alternatives. Mr. Hauser's sentence is suspended and he is placed on probation for a term of 18 months on the usual conditions and is further ordered to perform 200 hours of public service in a program approved by the Probation Office to be carried out within a period of 18 months from the entry of this order. The program will be designed by the Probation Office with a view to employ Mr. Hauser's talents as constructively as possible. The Court specifically suggests that Mr. Hauser's talents might be used in the efforts of the Rhode Island Heritage Commission to publish the Rhode Island Ethnic Pamphlet Series, designed to present and describe the various unique contributions, customs and folkways of ethnic groups to the State of Rhode Island.

SO ORDERED.

/s/ Francis J. Boyle, Chief Judge
United States District Court
District of Rhode Iesland

April 2, 1986.

• • •

SECTION II

Explanatory Note

Respondents, Providence Journal Company and Charles M. Hauser, appealed to the Court of Appeals for the First Circuit from a judgment of conviction entered in the District Court for the District of Rhode Island in a case entitled *In the Matter of Application to Adjudge the Providence Journal Company and its Executive Editor, Charles M. Hauser, in Criminal Contempt,* District Court Misc. No. 86-003B. Portions of that record are contained in Section I of the Joint Appendix.

Respondents moved in the Court of Appeals for the First Circuit for permission to supplement the record by adding to it the record of *Patriarca v. Federal Bureau of Investigation, et al.,* C.A. No. 85-0707B. That was the case where the order issued which respondents violated giving rise to the contempt proceeding, Misc. No. 86-003B. Respondents filed a record appendix in the Court of Appeals containing papers pertaining to *Patriarca v. Federal Bureau of Investigation, et al.*

The Court of Appeals then granted respondents' motion to supplement the record. A certified copy of the record of *Patriarca v. Federal Bureau of Investigation, et al.,* then was forwarded on June 3, 1986, by the District Court Clerk to the Court of Appeals.

Section II of this Joint Appendix contains papers from the *Patriarca v. Federal Bureau of Investigation, et al.,* record which were before the Court of Appeals when it considered respondents' appeal.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

(*Raymond J. Patriarca v. Federal Bureau of Investigation, et al,* District Court C.A. No. 85-0707B)

November 8, 1985 Complaint filed.

November 8, 1985 Plaintiff's motion for temporary restraining order and injunctive relief filed.

November 8, 1985 John F. Cicilline's affidavit in support of motion for temporary restraining order filed.

November 13, 1985 Conference held. Hearing scheduled for November 15, 1985.

November 13, 1985 Order regarding plaintiff's motion for temporary restraining order is granted and entered.

November 14, 1985 Motion to adjudge in contempt filed.

November 15, 1985 Entry of appearance of Joseph V. Cavanagh, Jr., William P. Robinson, Edwards & Angell on behalf of defendant, WJAR-TV Television Ten, Inc., filed.

November 15, 1985 Motion to add WPRI-TV as a party defendant filed.

November 15, 1985 Motion to add WLNE-TV as a party defendant filed.

November 15, 1985 Hearing held regarding continuance of temporary restraining order. Mr. Cavanagh argues. The court wants copies of that which was provided to other defendants. Mr. Medeiros argues. Mr. Sammartino argues for the federal defendants. Mr. Cicilline argues for plaintiff. The court issues its decision to continue the restraining order. The

court schedules a hearing on the preliminary injunction request for Tuesday, November 19, 1986 at 10:00 a.m. Regarding the motion to adjudge in contempt, defendants need time to respond. Mr. Cicilline shall prepare an appropriate order. Mr. Cavanagh's motion to stay the continuance of the temporary restraining order is denied.

November 18, 1985 Federal defendants' memorandum in support of objection to plaintiff's motion for injunctive relief is filed.

November 18, 1985 Federal defendants' supplemental memorandum is filed.

November 19, 1985 Hearing held regarding preliminary injunction. All agree that obtaining of the information gathered by the FBI was illegal. Seven exhibits are received. All exhibits are made part of the record. Mr. Cicilline's motion to join WPRI-TV and WLNE-TV as defendants is granted. The government has the material which the court ordered produced. It is received under seal, is contained in one box and placed in the vault after being labeled government's Exhibit 1. WPRI-TV and WLNE-TV have not been served with the complaint. The court issues its decision regarding the preliminary injunction request against the FBI and Department of Justice and grants same. The preliminary injunction request against WJAR-TV Television Ten, Inc. and the Providence Journal Company is denied. The temporary restraining order is vacated. The government's motion to have its memorandum made part of the record is granted. An order granting a preliminary injunction against the government defendants is entered. Mr. Cavanagh is to prepare an order denying the preliminary injunction against WJAR-TV Television Ten, Inc. and the Providence Journal Company.

November 19, 1985 Entry of appearances of Messrs. Hindle, Edwards and Medeiros, Edwards & Angell in behalf of the Providence Journal Company is filed.

November 19, 1985 Order regarding plaintiff's motion for restraining order as to defendants FBI and Department of Justice (preliminarily enjoining action by those defendants) is granted and the order enters.

November 25, 1985 Defendant Providence Journal and WJAR-TV Television Ten, Inc.'s motion to dismiss is filed.

November 25, 1985 Providence Journal Company's motion for extension of time to file a memorandum in support of its objection to plaintiff's motion to adjudge in contempt is filed.

November 25, 1985 Defendant Providence Journal Company's objection to motion to adjudge in contempt is filed.

December 2, 1985 An order regarding the motion to adjudge in contempt which assigns the matter to be heard at 10:00 a.m. on January 6, 1986 and requires defendant Providence Journal Company to elect by December 16, 1985 in writing whether it desires a trial by jury is entered and filed.

December 4, 1985 Plaintiff's objection to Providence Journal Company and WJAR-TV Tele-

vision Ten, Inc.'s motion to dismiss is filed.

December 12, 1985 Order vacating the temporary restraining order of November 13, 1985 with respect to the Providence Journal Company and WJAR-TV Television Ten, Inc. is entered.

December 13, 1985 Stipulation dismissing plaintiff's claims against WJAR-TV Television Ten, Inc. with prejudice, no interest, no costs, is entered.

December 13, 1985 Stipulation dismissing plaintiff's complaint against WPRI-TV with prejudice, each side to bear its costs, is entered.

December 13, 1985 Stipulation dismissing complaint against WLNE-TV with prejudice with each party to bear its own costs is entered.

December 15, 1985 Notice of election of the Providence Journal not to claim a trial by jury is filed.

December 16, 1985 An order whereby the court appoints William A. Curran of the law firm of Hanson, Curran & Parks as prosecuting attorney with full authority to prosecute the pending motion for contempt is entered.

December 17, 1985 Entry of appearance of William A. Curran as prosecuting attorney is filed.

December 19, 1985 Entry of appearance of V. Garvey and M. Butler for the federal defendants is filed.

January 10, 1986 Federal defendants' motion to dismiss is filed.

January 10, 1986 Notice of filing by the Department of Justice of copies of materials for the court's *ex-parte, in camera* review is filed.

February 5, 1986 Motion to amend the complaint is filed.

February 11, 1986 Plaintiff's objection to defendants' motion to dismiss is filed.

February 11, 1986 Plaintiff's motion for extension of time to file a memorandum in support of his objection to defendants' motion to dismiss is filed.

March 10, 1986 Federal defendants' response to plaintiff's motion to amend the complaint is filed.

March 18, 1986 Opinion holding that the Providence Journal showed no respect whatsoever, and, therefore, it must be found in contempt of the order entered November 13, 1985 and scheduling a hearing at 10:00 a.m. on March 27, 1986 for the purpose of imposing a penalty is filed.

March 18, 1986 Plaintiff's motion to amend the complaint is granted and an order enters.

March 20, 1986 Order stating that after a hearing it is hereby found that the Providence Journal and its Executive Editor, Charles M. Hauser, are guilty of criminal contempt and scheduling a hearing for imposition of penalties for 10:00 a.m. on March 27, 1986 is filed and entered.

March 25, 1986 Stipulation that for the purposes of the contempt proceedings against respondents Providence Journal Company and Charles M. Hauser: (1) the net worth of the Providence Journal Company is in excess of $1,000,000, (2) the

net worth of Charles M. Hauser is in excess of $250,000, and (3) respondents will not contest the imposition of fines, if any, on the ground that the court did not have sufficient evidence concerning the financial status of the respondents is filed.

April 2, 1986 — An opinion holding that a penalty of fifty cents per copy is reasonable, and therefore a fine in the amount of $100,000 to be satisfied within sixty days is imposed against the Providence Journal. Mr. Hauser's sentence is suspended and he is placed on probation for a term of eighteen months on the usual conditions and is further ordered to perform 200 hours of public service in a program approved by the Probation Office to be carried out within a period of eighteen months from the entry of this order is entered.

April 3, 1986 — Notice of Appeal and fee filed.

April 3, 1986 — Providence Journal Company's application for stay of fine pending appeal filed. Said application is granted without surety by agreement and such order enters.

April 3, 1986 — Charles M. Hauser's application for stay pending appeal is filed. Said application is granted by agreement and such order enters.

April 24, 1986 — Federal defendants' motion to dismiss amended complaint is filed.

April 24, 1986 — Answer of Providence Journal Company to amended complaint is filed.

June 3, 1986 — Certified copy of pleadings from the record of *Patriarca v. FBI*, C.A. No. 85-0707B, is sent to Court of Appeals pursuant to order from the Court of Appeals granting respondents' motion to supplement the record on the appeal of Misc. No. 86-003B, *IN THE MATTER OF APPLICATION TO ADJUDGE THE PROVIDENCE JOURNAL COMPANY AND ITS EXECUTIVE EDITOR, CHARLES M. HAUSER, IN CRIMINAL CONTEMPT.*

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA, Individually and as Administrator of the Estate of Raymond L.S. Patriarca

v CIVIL ACTION NO. 85-0707B

FEDERAL BUREAU OF INVESTIGATION

and

WILLIAM H. WEBSTER, Director

and

UNITED STATES DEPARTMENT OF JUSTICE

and

EDWIN MEESE, ATTORNEY GENERAL

and

THE PROVIDENCE JOURNAL COMPANY

and

WJAR TELEVISION TEN

COMPLAINT

PARTIES

1. Raymond J. Patriarca is a citizen of the United States, and a resident of the State of Rhode Island. He is also the son of the late Raymond L.S. Patriarca, who during the years 1962 to 1965 was the owner of National Cigarette Service located at 168 Atwells Avenue in Providence. The plaintiff is also the administrator of the estate of Raymond L.S. Patriarca.

2. The defendant Federal Bureau of Investigation (hereinafter referred to as "F.B.I.") is an agency of the Executive branch of the United States Government.

3. Defendant, William H. Webster (hereinafter referred to as "The Director") is the Director of the F.B.I.

4. The defendant, United States Department of Justice (hereinafter referred to as "Justice Department") is an agency of the executive branch of the United States Government.

5. The defendant Edwin Meese ([sic] hereinafter referred to as "Attorney General" is the Attorney General of the United States and, as such, is in charge of the Justice Department.

6. The defendant Providence Journal (hereinafter referred to as the "Journal") is a corporation organized and existing under the laws of the State of Rhode Island, with its principal offices located at 75 Fountain Street, Providence, that is engaged in the business of publishing newspapers.

7. WJAR TELEVISION TEN ([sic] hereinafter referred to as "WJAR" is a television station whose offices are located at 111 Dorrance Street in the City of Providence, that is engaged in the business of dissemenating [sic] news.

JURISDICTION AND VENUE

8. This is an action brought under the Freedom of Information Act (hereinafter referred to as "The Act") 5 USC 552 to declare unlawful, the defendant's dissemenation [sic] of logs and airtels compiled during the course of

an illegal electronic surveillance during the years 1962 to 1965.

9. This court has subject matter jurisdiction over this action pursuant to 5 USC 552 (h)(l), and 18 USC 2510 et. seq.

10. Venue of this action is proper under 5 USC 552 (h)(l) because the plaintiff is a resident of this Judicial District.

CAUSE OF ACTION

11. In March of 1962, an electronic listening device was placed within premises located at 168 Atwells Avenue in Providence, which premises housed the offices of National Cigarette Services. National Cigarette Services was a business owned and operated by the father of the plaintiff.

12. The listening device which had been surreptitiously placed within the premises, by the FBI, was done so by means of an illegal entry and an illegal installation, all in violation of rights secured to the plaintiff and his now deceased father, by the Fourth Amendment to the United States Constitution.

13. That listening device was implanted and monitored until July of 1965 when a second illegal entry was occasioned by the defendant FBI to allow for its removal.

14. The defendant FBI, and its director, monitored those conversations from a listening post located within the general area of the 168 Atwells Avenue premises, and thereafter forwarded logs and airtels to other FBI officers and employees, and to the Department of Justice, and its Attorney General.

15. The conversations which were monitored and then reduced to handwritten, typed, and printed logs and airtels included conversations between Raymond L.S. Patriarca and others, Raymond L.S. Patriarca, and Raymond J. Patriarca, which were personal, medical, or similar and whose dissementation would constitute a clearly unwarranted invasion of personal privacy.

16. That the transcription of the logs and airtels was done in such a manner that it allowed for error, omission, and subjective analysis, thus making them an unreliable base for the dissemenation [sic] of news.

17. At a date, unknown to the plaintiff, the defendant, Department of Justice and its Attorney General authorized the release of the illegally obtained logs and airtels to the defendant Journal and to the defendant, WJAR, pursuant to request made by them under the Freedom of Information Act.

18. That on November 6, 1985, the defendant WJAR, dissemenated [sic] portions of logs furnished to them by the defendant FBI and its defendant Director.

19. That upon reasonable information and belief, the defendant Journal is in the process of preparing for the dissemenation [sic] of these airtels and logs in its newspapers.

20. That on October 4, 1985, the plaintiff sought copies of the airtels and logs from the United States Attorney for the District of Rhode Island (appendix A).

21. That on October 9, 1985, the plaintiff sought copies of the air tels [sic] and logs from the Defendant Director of the FBI (appendix B).

22. That copies of the requested documents have not been furnished to the plaintiff. (appendix C).

23. That conversations monitored and subsequently reduced to logs and air tels [sic] were of the most personal nature, and their release would clearly constitute an unwarranted invasion of the plaintiffs personal privacy and that of his late father.

24. That the conversations illegally monitored by the FBI and subsequently reduced to logs and airtels involve conversations between a father and others, and a father and son about such personal matters as the health of the parties involved, and an ailing mother; the upbringing and education of a child, and other similar type conversations, whose disclosure is all proscribed by the provisions of 5 USC 552 (b)(6) and 7(C).

25. That the disclosure, dissemenation [sic], release and publication of the aforesaid materials violates an established policy of the defendant Justice Department and its Attorney General (appendix d).

26. That the disclosure, release, dissemenation, and publication of the aforesaid materials involves the kind of insidious invasion of privacy that Congress intended to prevent by the creation of exemption to 5 USC 552.

Wherefore, your plaintiff prays for entry of the following relief:

1. A declaration that the defendants have improperly dissemenated [sic] material which has been exempted from the Freedom of Information Act.

2. An injunction against the defendants' further publication of 5 USC 552 (b)(6) and 7(C) information.

3. An order requiring the immediate production by the defendants of copies of the airtels and logs to the plaintiff.

4. An award to plaintiff of reasonable attorneys fees, and the costs of this suit.

RAYMOND PATRIARCA
By His Attorney

/s/ JOHN F. CICILLINE
165 Atwells Avenue
Providence, Rhode Island

October 4, 1985

Lincoln Almond, Esq.
United States Attorney
Federal Building
Providence, Rhode Island

Dear Mr. Almond:

Please be advised that I represent Raymond J. Patriarca, who is interested in obtaining a copy of the air-tels and logs compiled in connection with the surveillance of premises located at 168-170 Atwells Avenue. It is our understanding that these documents have already been released to the press.

I, therefore, request that you furnish me with a copy of these documents for Mr. Patriarca's review.

Sincerely,

John F. Cicilline
JFC/haq

United States Attorney
District of Rhode Island
Post Office Box 1401
Providence, Rhode Island, 02901
401/528-5477
FTS 836-5477

October 7, 1985

John F. Cicilline, Esq.
165 Atwells Avenue
Providence, Rhode Island 02903

Dear Mr. Cicilline:

This will acknowledge receipt of your letter of October 4, 1985, on behalf of Raymond J. Patriarca, seeking records in connection with the surveillance at 168-170 Atwells Avenue.

Your request should be forwarded to the Director of the Federal Bureau of Investigation in accordance with the provisions of the Freedom of Information Act.

Sincerely,

/s/ LINCOLN C. ALMOND
United States Attorney

LCA:by

October 9, 1985

Director
Federal Bureau of Investigation
Washington, D.C.

Dear Sir:

The Hartford Current [sic] recently published an article in which they claimed to have air tels [sic] and logs produced by the FBI in connection with their surveillance of premises located at 168-170 Atwells Avenue in Providence, Rhode Island during 1962 and 1963.

I represent Raymond J. Patriarca whose privacy interest is being violated by the publication of those logs and air

tels. In an effort to determine what further violations may take place by further publication, I requested that the United States Attorney for the District of Rhode Island furnish me with copies of the released air tels and logs. I was advised to request this information from you. I am, therefore, making a request that you forward to me on behalf of Mr. Patriarca, copies of those air tels and logs.
Sincerely,

John F. Cicilline
JFC/haq

(Seal)

U.S. Department of Justice
Federal Bureau of Investigation
Washington, D.C. 20535
November 01, 1985
Request No. 264233

RE: FBI SURVEILLANCE OF 168-170/19
62-1963 AIRTELS & LOGS

John F. Cicilline, Esq.
165 Atwells Avenue
Providence, RI 02903

Dear Requester:

This acknowledges your recent Freedom of Information-Privacy Acts (FOIPA) request submitted to the FBI.

[ ] Based on the limited information you provided, we cannot make an accurate search of our records. Please furnish your complete name, alias, date and place of birth, prior addresses, employments, and any specific data that would permit us to locate the documents you seek.

[ ] Please submit your notarized signature. This procedure is designed to insure that documents, if located, are released only to an individual having right of access to the information.

[ ] If you want a search of our Identification Division records for any arrest record that might pertain to you, please comply with the enclosed

instructions set forth in Attorney General Order 556-73. Fingerprint impressions are needed for comparison with records in the Identification Division to insure that an individual's record is not disseminated to an unauthorized person.

[X] We are currently searching the indices to our central records system files at FBI Headquarters for any documents which may pertain to your request. Upon completion of this search you will be notified of the results.

Your request has been assigned the number indicated above. Please use this number in all correspondence with us.

Sincerely yours,

/s/ James R. Hall
Chief
Freedom of Information-
Privacy Acts Section
Records Management Division

[ ] Enclosure

(Seal)

OFFICE OF THE DEPUTY ATTORNEY GENERAL
Washington, D.C. 20530

October 21, 1977

Matthew F. Medeiros, Esquire
One Hospital Trust Plaza
Providence, Rhode Island 02903

Dear Mr. Medeiros:

You appealed on behalf of your client, the *Providence Journal-Bulletin*, from the denial by Director Kelley of your request for access to records of certain electronic surveillances conducted by the Federal Bureau of Investigation.

After careful consideration of this appeal, I have decided to affirm the initial action of Director Kelley, but

to do so on narrow grounds. The records in question are clearly investigatory in nature and they were compiled for law enforcement purposes. Based on a review of these records by a member of my staff, however, it appears that there are no pending or contemplated law enforcement proceedings with which release would interfere. Accordingly, I have determined that 5 U.S.C. 552(b)(7)(A), one of the exemptions cited by Director Kelley, does not apply. I have also concluded that the records as to which he cited 5 U.S.C. 552(b)(7)(D) are actually outside the scope of your client's request, rendering that exemption inapplicable as well. As a result, I am affirming the initial action in this case solely on the basis that release of the requested records, or any reasonably segregable portion of them, would result in an unwarranted invasion of personal privacy. 5 U.S.C. 552(b)(7)(C).

In reaching the conclusion that these records should not be released, I have considered the public interest in their contents and the fact that your client would serve as a conduit for the transmittal of this information to the public. Of overriding importance, however, is the fact that the conversations in question were intercepted in willful and flagrant violation of the Constitution and applicable Federal Law. The Government could not and cannot use this material in court in any way against the parties to these conversations or any of the persons mentioned therein. As a general proposition, the Government should not be allowed or forced to release unlawfully obtained evidence, thereby doing indirectly that which the law forbids doing directly. In my view, the privacy provisions of the Freedom of of [sic] Information Act can properly be applied, and should be applied, to prevent such a result. As to individuals merely mentioned in the course of these intercepted conversations, this conclusion is reinforced when one considers who the sources of the references to them are, as well as the fact that the content of the references is unverified. On balance, it is my judgment that the public interest in the release of these materials, although substantial, is nonetheless insufficient to outweigh the per-

sonal privacy interests involved. Because the release of these materials is not required by the Freedom of Information Act, their disclosure as a matter of agency discretion is prohibited by the Privacy Act of 1974.

As you are aware, judicial review of my action on this administrative appeal is available to your client in the United States District Court for the judicial district in which it has its principal place of business, or in the District of Columbia, which is also where the records it seeks are located.

Sincerely,

Peter F. Flaherty
Deputy Attorney General

/s/ By: Quinlan J. Shea Jr., Director
Office of Privacy and Information Appeals

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA, Individually
and as Administrator of the Estate of
Raymond L.S. Patriarca

V

FEDERAL BUREAU OF INVESTIGATION

and

WILLIAM H. WEBSTER, Director

and CIVIL ACTION NO.
85-0707B

UNITED STATES DEPARTMENT OF JUSTICE

and

EDWIN MEESE, ATTORNEY GENERAL

and

THE PROVIDENCE JOURNAL COMPANY

and

WJAR TELEVISION TEN

MOTION OF PLAINTIFF FOR TEMPORARY
INJUNCTION and/or INJUNCTIVE RELIEF

The plaintiff by and through his counsel hereby moves this Honorable Court for the entry of an order granting a temporary restraining order and/or any other relief that this Court may deem just and proper enjoining the named defendants from dissemenating or publishing logs and airtels compiled as a result of the electronic surveillance

conducted at 168 Atwells Avenue between March of 1962 and July of 1965.

RAYMOND J. PATRIARCA
By his Attorney

/s/ JOHN F. CICILLINE
165 Atwells Avenue
Providence, Rhode Island

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA, Individually
and as Administrator of the Estate of
Raymond L.S. Patriarca

V

FEDERAL BUREAU OF INVESTIGATION

and

WILLIAM H. WEBSTER, Director

and CIVIL ACTION NO.
85-0707B

UNITED STATES DEPARTMENT OF JUSTICE

and

EDWIN MEESE, ATTORNEY GENERAL

and

THE PROVIDENCE JOURNAL COMPANY

and

WJAR TELEVISION TEN

AFFIDAVIT IN SUPPORT OF
MOTION FOR TEMPORARY INJUNCTIVE RELIEF

I, John F. Cicilline, Attorney for the plaintiff hereby on oath depose and say:

1. That I am counsel for the plaintiff in the above captioned legal proceeding.

2. That the dissemenation and publication of the logs and airtels will cause irreperable [sic] harm, damage, and

injury to the Constitutional and privacy rights of the plaintiff.

3. That the complaint filed on behalf of the plaintiff raises constitutional and statutory questions of law which may be mooted unless the plaintiffs motion for injunctive relief is granted.

4. That the only certain way to protect the rights of the plaintiff is by the grant of injunctive relief.

/s/ JOHN F. CICILLINE
165 Atwells Avenue
Providence, Rhode Island

Subscribed and sworn to before this 8 day of November, 1985.

/s/ James Ruggiero
NOTARY PUBLIC

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Raymond J. Patriarca, Individually
and as Administrator of the Estate
of Raymond L.S. Patriarca

v.

Federal Bureau of Investigation

and

William H. Webster, Director

and

United States Department of Justice

and

Edwin Meese, Attorney General

and

The Providence Journal Company

and

WJAR Television Ten

ORDER

In the above entitled cause the plaintiffs motion for temporary restraining order is granted to the extent that the defendants, severally and individually are restrained from distrubing [sic], disseminating and otherwise publishing the logs or airtels, or reports thereof, generated as a result of the electronic surveillance conducted at 168 Atwells Avenue, between March of 1962 and July of 1965, as

they relate to Raymond J. Patriarca. pending [sic] hearing at 10:00 A.M. on Friday, Nov 15, 1985

/s/ Francis J. Boyle
Chief Judge

Entered as an order of this court this 13th day of November 1985.

/s/ Robert R. Henry
Deputy Clerk

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Raymond J. Patriarca, individually
and as Administrator of the Estate
of Raymond L.S. Patriarca

V

Federal Bureau of Investigation

and

CIVIL ACTION NO.
85-0707-B

William H. Webster, Director

and

United States Department of Justice

and

Edwin Meese, Attorney General

and

The Providence Journal

and

WJAR Television Ten

MOTION TO ADJUDGE IN CONTEMPT

Now comes the plaintiff in the above entitled cause and avers as follows:

1. That on November 8, 1985, he filed a complaint in the United States District Court to declare unlawful the

defendants dissemenation of logs and airtels compiled during the course of an electronic surveillance during the years 1962 through 1965, at 168 Atwells Avenue in Providence.

2. That the complaint asserted that the dissemenation publication and distributions of these logs and airtels served no public purpose, and in fact, involved the kind of insidious invasion of privacy that Congress intended to prevent by the creation of exemptions to 5 USC 552.

3. That in order to adequately protect his right to privacy, the plaintiff sought injunctive relief pending a determination of the issue.

4. That the District Court on November 13, 1985, entered an order temporarily restraining the defendants severally and individually "from distributing, dissemenating and otherwise publishing the logs, airtels or reports thereof, generated as a result of the electronic surveillance conducted at 168 Atwells Avenue between March of 1962 and July of 1965 as they related to Raymond J. Patriarca."

5. That the party defendants were each notified of the courts order.

6. That notwithstanding such order, the Providence Journal, and its Vice President and Executive Editor, Charles Hauser, on November 14, 1985, distributed, dissemenated, and published the logs, airtels, and reports thereof.

7. That as a result of such publication, distribution and dissemenation, the plaintiffs right to privacy has been

further violated and invaded causing him irreparable harm.

8. That the dissemenation, distribution and publication of the aforesaid materials was done with malice, disrespect for the court, and with a deliberate indifference to accepted court procedure.

9. That as a result of such publications, distribution, and dissemenation, the dignity and authority of the Court has been assaulted, and the defendant Providence Journal Company and its Vice President and Executive Editor Hauser are guilty of contempt.

Wherefore, your Plaintiff Raymond J. Patriarca moves that this Honorable Court adjudge the defendant, Providence Journal Company and its Executive Director in contempt of court.

RAYMOND J. PATRIARCA
By his Attorney

/s/ JOHN F. CICILLINE
165 Atwells Avenue
Providence, Rhode Island

DATED: NOVEMBER 14, 1985

(Certification Omitted)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA	)	
	)	
Vs.	)	C.A. No. 85-0707 B
	)	
FEDERAL BUREAU OF INVESTIGATION, ET AL	)	

ENTRY OF APPEARANCE

We hereby enter our appearance on behalf of defendant WJAR-TV Television Ten in the above-entitled case.

/s/ Joseph V. Cavanagh, Jr.

/s/ William P. Robinson
Edwards & Angell
2700 Hospital Trust Tower
Providence, RI 02903
401-274-9200

Dated: November 15, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA, Individually and as Administrator of the Estate of Raymond L. S. Patriarca	)	
	)	C. A. No. 85-0707
vs	)	
FEDERAL BUREAU OF INVESTIGATION	)	
and	)	
WILLIAM H. WEBSTER, DIRECTOR	)	
and	)	
UNITED STATES DEPARTMENT OF JUSTICE	)	
and	)	
EDWIN MEESE, ATTORNEY GENERAL	)	
and	)	
THE PROVIDENCE JOURNAL COMPANY	)	
and	)	
WJAR TELEVISION TEN	)	

MEMORANDUM IN SUPPORT OF OBJECTION TO PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF

In this case, the plaintiff requests that the defendants be enjoined from further disclosure, publication, release and dissemination of certain material requested from the federal defendants pursuant to the Freedom of Information Act, 5 U.S.C. 552 (FOIA). The plaintiff declares that jurisdiction is founded upon the FOIA. It is submitted, there is no jurisdiction under the FOIA for the Court to grant the injunction. *See Chrysler Corp vs Brown* 441 U.S. 281, 290-294, (1979); *G.T.E. Sylvania, Inc. vs Consumers Union* 445 U.S. 375, 378 (N2) 1980; St. Michael's

Convalescent vs State of Cal 643 F2d 1369 (9th Circ- [sic] 1981); *Now Washington D.C. Chapt vs Soc Sec Ad* 738 F2d 727 (D.C. Circ- [sic] 1984) § 745; *General Electric Co. vs U. S. NVC. req.* 750 F2 1394 (7th Circ- [sic] 1984). As the Supreme Court in *Chrysler* stated at page 292:

> "That the FOIA is exclusively a disclosure statute is, perhaps, demonstrated most convincingly by examining its provision for judicial relief. Subsection (a)(4)(B) gives federal district courts "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). That provision does not give the authority to bar disclosure, and thus fortifies our belief that Chrysler, and courts which have shared its view, have incorrectly interpreted the exemption provisions of the FOIA."

The plaintiff also cites the related case of *Providence Journal Company vs F.B.I.* for support of his request. The Court did not grant injunctive relief in the *Providence Journal Case.* Nor did it bar future release or dissemination of the material. As stated at page 1014 of the decision:

> "[D]isclosure, not secrecy, is the dominant objective of the [FOIA]", *Department of the Air Force v. Rose,* 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976), and Congress has decried the news media's underuse of the FOIA, see 460 F. Supp. at 790. But these concerns must give way to Congress' specific protection of this narrow class of information. Our holding is not broad. It gives agencies no sweeping power to withhold information, and does not create a new, general exemption for illegally obained [sic] information. We are concerned only with the "contents" of "wire" or "oral communications" intercepted"

> [sic] before June 19, 1968, by means of an "electronic, mechanical, or other device", 18 U.S.C. § 2510(8), (1), (2), (4), and (5), in violation of the Constitution or federal law.[9] Moreover, we need not decide to what extent "aggrieved person[s]", 18 U.S.C. § 2510(11), or a criminal prosecutor might have rights different from the third party which brought this suit. We decide only that the FBI may properly turn down this FOIA request under Exemption 7(C).

It is respectfully submitted, under the circumstances, the Court lacks jurisdiction under the FOIA to grant injunctive relief. Further the *Providence Journal* case did not bar future dissemination of the material.

UNITED STATES OF AMERICA,
BY ITS ATTORNEYS,
LINCOLN C. ALMOND
United States Attorney
EVERETT C. SAMMARTINO
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA, Individually and as Administrator of the Estate Raymond L.S. Patriarca	)	
vs	)	C.A. NO. 85-0707
FEDERAL BUREAU OF INVESTIGATION	)	
and	)	
WILLIAM H. WEBSTER, DIRECTOR	)	
and	)	
UNITED STATES DEPARTMENT OF JUSTICE	)	
and	)	
EDWIN MEESE, ATTORNEY GENERAL	)	
and	)	
THE PROVIDENCE JOURNAL COMPANY	)	
and	)	
WJAR TELEVISION TEN	)	

FEDERAL DEFENDANT'S [sic] SUPPLEMENTAL MEMORANDUM

(Received Nov. 18, 1985)

The Federal defendants respectfully emphasize, that the plaintiff seeks injunctive relief only under the Freedom of Information Act, 5 USC 552 (FOIA). It is clear that the Supreme Court has stated that there is no jurisdiction under the FOIA for a court to enjoin release of material. *Chrysler Corp. vs Brown*, 441 U.S. 281; and other cases cited in previous memorandum. The Supreme Court in *Chrysler* explicitly stated beginning at page 293:

> "Enlarged access to governmental information undoubtedly cuts against the privacy concerns of non-

governmental entites [sic], and as a matter of policy some balancing and accommodation may well be desirable. We simply hold here that Congress did not design the FOIA exemptions to be mandatory bars to disclosure.

This conclusion is further supported by the legislative history. The FOIA was enacted out of dissatisfaction with § 3 of the APA, which had not resulted in as much disclosure by the agencies as Congress leter [sic] thought desirable. Statements in both the Senate and House Reports on the effect of the exemptions support the interpretation that the exemptions were only meant to permit the agency to withhold certain information, and were not meant to mandate nondisclosure. For example, the House Report states:

> "[The FOIA] sets up workable standards for the categories of records which may be exempt from public disclosure. . . ."
>
> ". . . There may be legitimate reasons for nondisclosure and [the FOIA] is designed to permit nondisclosure in such cases."
>
> "[The FOIA] lists in a later subsection the specific categories of information which may be exempted from disclosure."

We therefore conclude that Congress did not limit an agency's discretion to disclose information when it enacted the FOIA. It necessarily follows that the Act does not afford Chrysler ay [sic] right to enjoin agency disclosure."

(Footnotes omitted)

Although the Court in its interim decision on November 15, 1985, feels that disclosure would "destroy the status quo," it still is necessary to base the Court's action on a jurisdictional predicate. Since the plaintiff claims only the FOIA as his jurisdictional underfooting and since the

Supreme Court has stated there can be no jurisdiction under the FOIA for a reverse FOIA injunction case, the Court cannot "create" jurisdiction under the FOIA. This Court is bound by Supreme Court holdings, unless and until the holding is reversed by the Court or a properly legislated law.

UNITED STATES OF AMERICA,
BY ITS ATTORNEYS,

LINCOLN C. ALMOND
United States Attorney

/s/ Everett C. Sammartino
EVERETT C. SAMMARTINO
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA	)	
	)	
v.	)	C.A. No.
	)	85-0707 B
FEDERAL BUREAU OF INVESTIGATION, ET AL.	)	
	)	

ENTRY OF APPEARANCE

(Filed November 19, 1985)

We hereby enter our appearance on behalf of defendant Providence Journal Company in the above-entitled case.

/s/ Edward F. Hindle

/s/ Knight Edwards

/s/ Matthew F. Medeiros
EDWARDS & ANGELL
2700 Hospital Trust Tower
Providence, RI 02903
401-274-9200

November 18, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA	)	
	)	
v.	)	C.A. No. 85-0707/B
	)	
FEDERAL BUREAU OF INVESTIGATION, ET AL.	)	

OBJECTION BY DEFENDANT
PROVIDENCE JOURNAL COMPANY
TO MOTION TO ADJUDGE IN CONTEMPT

Defendant Providence Journal Company objects to plaintiff's motion to adjudge it in contempt on the grounds to be set forth in a memorandum to be filed on or before December 13, 1985.

By its attorneys,
/s/ Edward Hindle
/s/ Knight Edwards
/s/ Joseph V. Cavanagh, Jr.
EDWARDS & ANGELL
2700 Hospital Trust Tower
Providence, Rhode Island 02903

November 25, 1985

(Certificate of Service Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA, Individually and as Administrator of the Estate of Raymond L.S. Patriarca	)	
	)	
v.	)	
	)	
FEDERAL BUREAU OF INVESTIGATION and WILLIAM H. WEBSTER, DIRECTOR, and UNITED STATES DEPARTMENT OF JUSTICE, and EDWIN MEESE, ATTORNEY GENERAL and THE PROVIDENCE JOURNAL COMPANY and WJAR TELEVISION TEN	)	C. A. NO. 85-0707B

ORDER

Upon consideration of Plaintiff's motion to adjudge Defendant Providence Journal Company and its Executive Editor Charles M. Hauser in contempt of the order of this Court dated November 13, 1985 as set forth in said motion and the objection of The Providence Journal Company filed November 25, 1985, Plaintiff's motion to adjudge Defendant The Providence Journal Company and its Executive Editor Charles M. Hauser and the objection filed November 25, 1985 are assigned to be heard at 10:00 o'clock A.M. on Monday, January 6, 1986. Defendant Providence Journal shall elect on or before December 16, 1985 in writing filed in the office of the Clerk of this Court, whether or not it desires a trial by jury.

ENTERED as an Order of this Court this 2nd day of December, A.D., 1985.

SO ORDERED.

/s/ Francis J. Boyle
Francis J. Boyle, Chief Judge
United States District Court
District of Rhode Island
Dec 2, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA, Individually and as Administrator of the Estate of Raymond L.S. Patriarca	)	
v.	)	
FEDERAL BUREAU OF INVESTIGATION and WILLIAM H. WEBSTER, DIRECTOR, and UNITED STATES DEPARTMENT OF JUSTICE, and EDWIN MEESE, ATTORNEY GENERAL and THE PROVIDENCE JOURNAL COMPANY and WJAR TELEVISION TEN	)	C.A. NO. 85-0707B

ORDER

In accord with the provisions of Rule 42(b) of the Federal Rules of Criminal Procedure, since the United States Attorney for the District of Rhode Island represents parties who are Defendants in this action, and since the attorney for Plaintiff has declined to appear as prosecutor in this action, the Court hereby appoints William A. Curran of the law firm of Hanson, Curran and Parks, 1210 Turks Head Building, Westminster Street, Providence, Rhode Island, 02903, as prosecuting attorney with full au-

thority to prosecute the pending Motion for Contempt of this Court's Order of November 13, 1985.

SO ORDERED.

/s/ Francis J. Boyle
Francis J. Boyle, Chief Judge
United States District Court
District of Rhode Island
December 16, 1985.

UNITED STATES DISTRICT COURT
FOR
THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA	)	
	)	
v.	)	C.A. NO. 85-0707 B
	)	
FEDERAL BUREAU OF INVESTIGATION	)	
and	)	
UNITED STATES DEPARTMENT OF JUSTICE	)	
and	)	
EDWIN MEESE, ATTORNEY GENERAL	)	
and	)	
THE PROVIDENCE JOURNAL COMPANY	)	
	)	
	)	
IN THE MATTER OF APPLICATION TO ADJUDGE THE PROVIDENCE JOURNAL COMPANY AND ITS EXECUTIVE EDITOR, CHARLES M. HAUSER, IN CRIMINAL CONTEMPT	)	MISC. NO. 86-003 B

ORDER

(Received March 20, 1986)

This matter came on for hearing before this Court pursuant to an order directed to the respondents to show cause why the Providence Journal Company and its Executive Editor, Charles M. Hauser, should not be found guilty of criminal contempt and, after a hearing thereon and upon consideration of the facts, the arguments and

the authorities cited in the briefs of counsel, it is hereby found that:

The Providence Journal Company and its Executive Editor, Charles M. Hauser, are guilty of criminal contempt.

This matter is set down for hearing on the imposition of penalties against the respondents for the 27th day of March, 1986 at 10:00 a.m.

ENTERED as an Order of this Court this — day of March, 1986.

SO ORDERED:

/s/ Francis J. Boyle, Chief Judge
United States District Court
District of Rhode Island
March 19, 1986

(Proof of Service Omitted)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	)	Civil Action No. 85-0707

NOTICE OF FILING BY THE DEPARTMENT OF JUSTICE

The Clerk of this Court will please take notice that, pursuant to the Court's request on November 11, 1985, defendant the United States Department of Justice, herewith submits for filing for the court's *ex parte, in camera* review copies of all pages containing statements to, by, or about Raymond J. Patriarca exerpted from documents submitted under seal to the Court on November 11, 1985. These are exerpts from all documents that had been released by the Federal Bureau of Investigation, as of November 11, 1985, pursuant to third party FOIA requests for summaries and transcripts of the electronic surveillance conducted at 168 Atwells Avenue, Providence, Rhode Island, between March 1962 and July 1965.

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

LINCOLN C. ALMOND
United States Attorney

EVERETT SAMMARTINO
Assistant United States Attorney

/s/ Vincent M. Garvey/MSB
VINCENT M. GARVEY

/s/ Mona S. Butler
MONA S. BUTLER

U.S. Department of Justice
Civil Division, Room 3337
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 633-3336

Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	)	Civil Action No. 85-0707B

FEDERAL DEFENDANTS'
MOTION TO DISMISS AMENDED COMPLAINT

The federal defendants, Department of Justice, Federal Bureau of Investigation, Edwin Meese, and William H. Webster, hereby move, pursuant to Rule 12(b)(1) and 12(b)(6), Fed. R. Civ. P., to dismiss plaintiff's Amended Complaint for lack of jurisdiction and for failure to state a claim upon which relief can be granted. Neither the Freedom of Information Act, 5 U.S.C. § 552, nor Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510, *et seq.*, confers jurisdiction to enjoin an agency of the United States from releasing documents requested under the FOIA and, in any event, plaintiff's claim for injunctive relief is now moot. In addition, plaintiff has failed to state a claim for damages under the Privacy Act, 5 U.S.C. § 552a, the Crime Control Act, or the United States Constitution.

In support of this motion, the Court is referred to the memorandum of points and authorities and declaration of

Frank C. Underwood, filed herewith, as well as to the memorandum of points and authorities filed on January 10, 1986, in support of Federal Defendants' Motion to Dismiss.

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

LINCOLN C. ALMOND
United States Attorney

EVERETT SAMMARTINO
Assistant United States Attorney

/s/ Vincent M. Garvey/
Mona S. Butler
VINCENT M. GARVEY

/s/ Mona S. Butler
MONA S. BUTLER

U. S. Department of Justice
Civil Division, Room 3337
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-3336

Attorneys for Federal Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RAYMOND J. PATRIARCA, Plaintiff v. FEDERAL BUREAU OF INVESTIGATION, and WILLIAM H. WEBSTER, DIRECTOR and UNITED STATES DEPARTMENT OF JUSTICE and EDWIN MEESE, ATTORNEY GENERAL and THE PROVIDENCE JOURNAL COMPANY, Defendants	Civil Action No. 85-0707B

AMENDED COMPLAINT

Paragraphs 1 through 26 of the original Complaint, along with the prayer for relief contained in said Complaint, are hereby realleged and incorporated herein by reference.

COUNT TWO—5 U.S.C. SECTION 552a

27. Count Two is brought pursuant to the "Privacy Act", 5 U.S.C. Section 552a, against the defendants, United States Department of Justice ("Justice Department") and Federal Bureau of Investigation ("FBI").

JURISDICTION

28. This Court has jurisdiction over this count, pursuant to 5 U.S.C. Section 552a(g)(1)(D), and 28 U.S.C. Section 1331.

29. The defendants, Justice Department and FBI, are "agencies" as that term is defined in 5 U.S.C. Section 552a and 5 U.S.C. Section 552(e), and are subject to all provisions contained in said "Privacy Act."

30. The logs and airtels that were released by said defendants (see Paragraph 11 & 17, above) constituted a "record as that term is defined in 5 U.S.C. Section 552a (a)(4).

31. Said defendants' release of said record was not done pursuant to a written request by, or with the prior written consent of, the plaintiff, who is the individual to whom the record pertains, nor was said release required under the Freedom of Information Act, 5 U.S.C. Section 552, thus violating the "Conditions of Disclosure" of said "Privacy Act," 5 U.S.C. Section 552a(b).

32. Said violation of the "Privacy Act" had an adverse effect on the plaintiff.

33. Said violation of the "Privacy Act" was intentional or willful.

WHEREFORE, in this Count Two, the plaintiff prays for entry of the following relief against the defendants, the Justice Department and the FBI:

1. Actual damages of no less than one thousand dollars ($1,000.00);

2. Litigation costs and reasonable attorneys' fees.

COUNT THREE—18 U.S.C. SECTIONS 2510-2520

34. Paragraphs 1 through 26 of the original Complaint are hereby realleged and incorporated herein by reference.

35. Count Three is brought pursuant to 18 U.S.C. Section 2520, against William H. Webster and Edwin Meese for the unlawful disclosure of the plaintiff's oral communications, and against the Providence Journal Company ("the Journal") for the unlawful use of such communications.

JURISDICTION

36. The Court has jurisdiction over this count, pursuant to 18 U.S.C. Section 2520, and 28 U.S.C. Section 1331.

37. All of said defendants are "persons" as that term is defined in 18 U.S.C. Section 2510(6); and the conversations between the plaintiff and the plaintiff's father (see paragraphs 11-15, above) constitute "oral communications," as that term is defined in 18 U.S.C. Section 2510(2).

38. The placing of an electronic listening device at 168 Atwells Avenue, Providence, and the subsequent interception of the oral communications that took place

there, were in violation of all relevant Federal constitutional and statutory provisions, including the Fourth Amendment to the Constitution.

39. The disclosure of the oral communications involving the plaintiff by the defendants, William H. Webster and Edwin Meese, or by persons for whose conduct said defendants are responsible, constitutes a violation of 18 U.S.C. Sections 2510-2520.

40. The publication of said oral communications by the Journal constitutes an unlawful use of said communications, in violation of 18 U.S.C. Sections 2510-2520.

WHEREFORE, in this Count Three, the plaintiff prays for entry of the following relief against the defendants, William H. Webster, Edwin Meese and the Journal:

1. Actual damages of no less than one thousand dollars ($1,000.00);

2. Punitive damages, in an amount to be determined by the Court;

3. Litigation costs and reasonable attorneys' fees.

COUNT FOUR—28 U.S.C. SECTION 1331 AND THE FOURTH AMENDMENT

41. Paragraphs 1 through 26 of the original Complaint, and paragraphs 38 of this Amended Complaint, are hereby realleged and incorporated herein by reference.

42. Count Four is brought pursuant to 28 U.S.C. Section 1331 and the Fourth Amendment to the United States Constitution, against William H. Webster and Edwin Meese, and against the Journal.

JURISDICTION

43. The Court has jurisdiction over this count, pursuant to 28 U.S.C. Section 1331 and the Fourth Amendment to the United States Constitution.

44. The willful disclosure of unconstitutionally-intercepted communications of the plaintiff by the defendants, William H. Webster and Edwin Meese, or by persons for whose conduct said defendants were responsible, constitutes a violation of the plaintiff's rights guaranteed by the Fourth Amendment to the United States Constitution.

45. The obtaining and publishing of communications of the plaintiff by the Journal, which the Journal knew to have been the "fruits" of unconstitutional searches and/or seizures, constitutes a violation by the Journal of the plaintiff's rights guaranteed by the Fourth Amendment, and constitutes a conspiracy between the Journal and Federal officials to violate said Fourth Amendment rights.

WHEREFORE, in this Count Four, the plaintiff prays for entry of the following relief against the defendants, William H. Webster, Edwin Meese, and the Journal:

1. Actual damages, in an amount to be determined by the Court;

2. Punitive or exemplary damages, in an amount to be determined by the Court;

3. Litigation costs and reasonable attorneys' fees.

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No. 87-65

In The
Supreme Court of the United States
October Term, 1987

UNITED STATES OF AMERICA,
Petitioner,
v.
PROVIDENCE JOURNAL COMPANY and CHARLES M. HAUSER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

I. Whether a trial judge has authority to restrain publication while considering an unprecedented conflict between first amendment and fourth amendment rights.

II. Whether a prior restraint order involving an unprecedented question of priority of fourth amendment rights of privacy versus first amendment rights of free press was "transparently invalid."

LIST OF PARTIES

Petitioner is the United States of America. The proceedings below were criminal contempt proceedings entitled *In the Matter of Application to Adjudge the Providence Journal Company and its Executive Editor, Charles M. Hauser, in Criminal Contempt.* That case was initiated by a special prosecutor appointed pursuant to Fed. R. Crim. P. 42(b).

Respondents are the Providence Journal Company and Charles M. Hauser, defendants below.

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No. 87-65

In The

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October Term, 1987

UNITED STATES OF AMERICA,

Petitioner,

v.

PROVIDENCE JOURNAL COMPANY and CHARLES M. HAUSER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. A-27-A-46) is reported at 820 F.2d 1342. An en banc addendum to, and modification of, that opinion (Pet. App. A-47-A-49) is reported at 820 F.2d 1354.

The opinion of the district court (Pet. App. A-1-A-22) is reported at 630 F. Supp. 993. A later rescript order imposing sentences (Pet. App. A-43-A-26) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1986. (A. 1). A petition for rehearing was denied on May 12, 1986. The petition for writ of certiorari was filed on July 9, 1987 and was granted on October 5, 1987.

The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. § 1254(1).

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STATUTES INVOLVED

Pertinent texts which are not set forth in the petition for certiorari are set forth in the appendix to this brief.

Constitutional Provisions:

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U.S. Const. amend. I

U.S. Const. amend. IV

Statutes:

Crimes and Criminal Procedure, ch. 645, § 1, 62 Stat. 701 (1948) (codified as amended at 18 U.S.C. § 401 (3) (1982 & Supp. III 1985))

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Omnibus Crime Control and Safe Streets Act, P.L. 90-351, 82 Stat. 223 (1968) (codified as amended at 18 U.S.C. § 2520 (1982 & Supp. III 1985)).

Rule:

Fed. R. Crim. P. 42(b)

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STATEMENT OF THE CASE

I. Illegal Entry and Seizure

From 1962 to 1965 the Federal Bureau of Investigation (hereinafter "FBI") conducted electronic surveillance at the offices of Raymond L. S. Patriarca, a reputed organized crime figure. (J.A. 74, 208). *See Providence Journal Co. v. Federal Bureau of Investigation,* 460 F. Supp. 762, 460 F. Supp. 778 (D.R.I. 1978), *stay issued,* 595 F.2d 889, *rev'd,* 602 F.2d 1010, 1011 (1st Cir. 1979), *cert. denied,* 444 U.S. 1071 (1980). The FBI had not obtained a warrant for its intrusion. *(Id.).* The surveillance was conducted in violation of fourth amendment rights. (*Id.,* J.A. 75, 83, 200 (November 19, 1985 entry), Pet. App. A-1, A-2). Tape recordings were made by the FBI of conversations overheard at the Patriarca offices. (J.A. 74, 75, *Providence Journal Co. v. Federal Bureau of Investigation,* 602 F.2d

at 1011). The tape recordings were eventually destroyed but logs and memoranda prepared after listening to the conversations were made and retained. (J.A. 74, 75, *Providence Journal Co. v. Federal Bureau of Investigation,* 602 F.2d at 1011).

II. Production of Illegally Seized Materials to the Providence Journal Company

(Providence Journal Co. v. Federal Bureau of Investigation)

In 1976, during Raymond L. S. Patriarca's lifetime, respondent Providence Journal Company (hereinafter "Journal"), a newspaper circulated throughout Rhode Island (Pet. App. A-2), sought to obtain, under the Freedom of Information Act,[1] the fruits of the illegal FBI electronic surveillance of the Patriarca offices. *Providence Journal Co. v. Federal Bureau of Investigation,* 602 F.2d at 1011. That request was denied administratively on the ground that release of the FBI materials would result in an unwarranted invasion of personal privacy. (*Id.,* J.A. 214-16). The Journal appealed that ruling to the United States District Court for the District of Rhode Island. *Providence Journal Co. v. Federal Bureau of Investigation,* 602 F.2d at 1011. Raymond L. S. Patriarca was allowed to intervene as a party defendant. *Id.* In 1979 the district court entered an order requiring the FBI to produce some of the illegally obtained materials to the Journal. 602 F.2d at 1012. Excluded from that order were

[1]Freedom of Information Act, P.L. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1982 & Supp. III 1985)).

materials relating to Raymond L. S. Patriarca's "private life, and to the private lives of his family members who are still living. . . ." *Id.*

The FBI and Raymond L. S. Patriarca appealed and requested that the trial court stay its order pending the appeal. *Providence Journal Co. v. Federal Bureau of Investigation,* 595 F.2d 889, 890 (1st Cir. 1979). The trial court granted only a brief stay since it believed that anything more would constitute a prior restraint of the Journal's publication rights. 595 F.2d at 890.

Motions for stays were then addressed to the Court of Appeals for the First Circuit. *Providence Journal Co. v. Federal Bureau of Investigation,* 595 F.2d 889 (1st Cir. 1979). The court of appeals balanced the Journal's right of access and publication of the materials against Raymond L. S. Patriarca's right of privacy and the FBI's rights. 595 F.2d at 890. It held that denial of a stay would irreparably harm movants but it would simply delay publication—assuming the Journal prevailed at the court of appeals—during the time that the appeals were being considered. *Id.* Therefore, the order requiring disclosure by the FBI to the Journal was stayed. *Id.*

The court of appeals eventually reversed the order. *Providence Journal Co. v. Federal Bureau of Investigation,* 602 F.2d at 1015. In its opinion, the court noted that Congress "in the clearest way" had decided that where illegal electronic surveillance invades privacy, disclosure of such illegally gathered information should be prohib-

ited.[2] 602 F.2d at 1013. Thus, it upheld the FBI's denial of the Journal's request for the materials and reversed the district court's order. 602 F.2d at 1015.

In 1985, after Raymond L. S. Patriarca's death, the Journal once again requested that the FBI produce the Patriarca materials (J.A. 90). Its request contained no reference to the opinion of the First Circuit. (*Id.*). On June 13, 1985 the FBI made the Patriarca materials available to the Journal. (J.A. 96-97).

III. Temporary Restraining Order Enjoining Publication

(Patriarca v. Federal Bureau of Investigation)

On September 22, 1985 *The Hartford Courant* published an article regarding the FBI's Patriarca materials. (J.A. 35, 101-13). Raymond J. Patriarca (hereinafter "Patriarca"), the son of Raymond L. S. Patriarca, became aware of this publication (J.A. 212) and also learned that the FBI had, at a date then unknown to him, authorized release of the Patriarca materials to the Journal and WJAR-TV Television Ten, Inc. (hereinafter "WJAR-TV"), a Rhode Island television station. (J.A. 209).

On November 8, 1985 Patriarca filed a complaint against the FBI, its director, the United States Department of Justice, the Attorney General, the Journal and WJAR-TV. (J.A. 33, 199, 206). The complaint alleged

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[2]Omnibus Crime Control and Safe Streets Act, P.L. 90-351, 82 Stat. 213 (1968) (codified as amended at 18 U.S.C. § 2511(1) (1982 & Supp. III 1985)).

Omnibus Crime Control and Safe Streets Act, P.L. 90-351, 82 Stat. 223 (1968) (codified as amended at 18 U.S.C. § 2520 (1982 & Supp. III 1985)).

that the FBI listening device was placed by means of illegal entry and installation in violation of Raymond L. S. Patriarca and Raymond J. Patriarca's fourth amendment rights. (J.A. 208). Patriarca alleged that airing the FBI materials would be an unwarranted invasion of his privacy. (J.A. 210). The complaint also alleged that the disclosure of the FBI materials was a violation of established policy of the Department of Justice and the Attorney General. (J.A. 210, 214-15).

The complaint sought, among other things, to enjoin the Journal from publishing information which would constitute an unwarranted invasion of Patriarca's personal privacy. (J.A. 210, 24 & 2). Along with the complaint, Patriarca filed a motion for a temporary restraining order and/or injunctive relief. (J.A. 199, 217-18). Accompanying the complaint and motion for injunctive relief was a supporting affidavit. (J.A. 199, 219-20). The affidavit asserted that constitutional questions were raised and that Patriarca would suffer irreparable harm from dissemination and publication of the FBI materials. (J.A. 219-20).

On Wednesday, November 13, 1985, at about 12:30 p.m., a chambers conference was held by Chief Judge Boyle to consider Patriarca's motion. (J.A. 33, 175-76). The court heard all counsel. (J.A. 166, 169). Among others in attendance at the conference were attorneys from a law firm which represented both the Journal and WJAR-TV. (J.A. 165). They argued that the requested order would be an unlawful prior restraint. (J.A. 169, 171, 172). The court expressed concern with the effect of publication on Patriarca's privacy interest and fourth amendment rights. (J.A. 174, *see also* J.A. 73, 182). The trial judge consid-

sidered whether the conflict between Patriarca's fourth amendment rights and the Journal's first amendment rights was as serious as the conflict between first amendment free press and sixth amendment fair trial rights. (J.A. 174, *see also* J.A. 73, 182). No precedent was offered regarding this dilemma. (J.A. 75, 174, Pet. App. A-12-A-13). The trial judge apparently was influenced by the fact that the FBI materials were illegally seized and that the First Circuit had earlier denied the Journal access to those materials. (J.A. 74, 83, 179, Pet. App. A-5, A-9, A-10, *see also* 73, 174, 182, 184, 186).

The trial court, because of its concern regarding a prior restraint, indicated that the matter would be heard the next morning, November 14, 1985. (J.A. 34, 73, 167). Counsel for the Journal indicated that they would need more time to prepare. (J.A. 167, Pet. App. A-3, A-10-A-11, A-13). The court acceded to the Journal's request and scheduled a hearing for Friday, November 15, 1985. (J.A. 34, 37, 73, 167, Pet. App. A-3, A-10-A-11). To preserve the status quo, an order was entered enjoining publication by the Journal and WJAR-TV of the illegally gathered materials as they relate to Patriarca pending the November 15, 1985 hearing. (J.A. 37, 73, 172, Pet. App. A-10, A-18). The court instructed counsel to return to court on November 15, 1985 and to bring some legal authority with them. (J.A. 174). The restraining order as it pertained to the media defendants was eventually vacated by Chief Judge Boyle on November 19, 1985. (J.A. 10, 89). At the same time a preliminary injunction entered enjoining the FBI and the United States Department of Justice from further dissemination, publication or other release of the materials regarding Patriarca. (J.A. 201

(second November 19, 1985 entry), R. (*Patriarca v. FBI*, C.A. 85-0707B) 18).

No request was made by the Journal to either the trial court or the Court of Appeals for the First Circuit to vacate or stay the order. (J.A. 36). No petition for mandamus was made to the court of appeals. (*Id.*) No appeal of the temporary restraining order was taken. (*Id.*).

IV. Criminal Contempt

The Journal's executive editor, respondent Charles M. Hauser, (J.A. 117), felt that it was crucial not to halt publication of even one edition because of the temporary restraining order. (J.A. 150). Due to its schedule, the Journal had until 10:30 p.m. on November 13, 1985 to determine if it was going to publish the next morning notwithstanding the temporary restraining order. (J.A. 123).

On November 14, 1985 the Journal and Hauser, although aware of the court's order, published articles concerning Patriarca from the materials illegally gathered by the FBI. (J.A. 34, 39, 45-48, 49, 55-57, 121).

Patriarca filed a motion to adjudge the Journal and Hauser in contempt. (J.A. 199, 223). Since the United States Attorney for the District of Rhode Island represented parties in Patriarca's lawsuit, and since Patriarca's attorney declined to appear as prosecutor, the court, pursuant to Fed. R. Crim. P. 42(b), appointed a special prosecutor. (J.A. 237). The special prosecutor began criminal contempt proceedings against the Journal and Hauser. (J.A. 1, 3).

Notice of the criminal contempt proceedings was given (J.A. 3, 31) and a hearing was held. (J.A. 1 (February 10, 1986 entry)). In addition, an agreed statement of facts was submitted. (J.A. 33, 114-15). Thereafter the court issued an opinion holding the Journal and Hauser in criminal contempt. (Pet. App. A-1-A-22).

In its opinion the court defined the issue as whether publication can be deferred to permit a court an opportunity to determine the right to publish. (Pet. App. A-2). The court determined

> (1) that the Journal does not enjoy its claimed unique, superior constitutional status, free of all judicial inquiry; (2) that the people of the United States are entitled a judicial determination of the extent of their Fourth Amendment security; (3) that it has been previously determined that the Journal had no right to the information, a determination of which the Journal had actual knowledge, and (4) that determinations of constitutional rights are vested by the Constitution in the Courts of the United States.

(Pet. App. A-3).

Another hearing was held regarding sentencing. (J.A. 1 (March 27, 1986 entry)). A penalty of fifty cents per copy was assessed against the Journal for a total fine of $100,000. (Pet. App. A-25). An eighteen month jail term was imposed on Hauser, which was suspended, and Hauser was ordered to perform 200 hours of public service. (J.A. 196, 197).

The Journal and Hauser appealed. (J.A. 2). On appeal, a panel of the Court of Appeals for the First Circuit reversed the contempt judgment. (J.A. 2, Pet. App. A-46).

The panel held that while court orders must normally be obeyed until vacated or modified (Pet. App. A-32), the temporary restraining order was "transparently invalid" and therefore could be disregarded by the Journal and Hauser. (Pet. App. A-44). No exact definition of transparently invalid was stated. (Pet. App. A-35). The panel held that the Journal and Hauser were not required to seek judicial review before violating the order. (Pet. App. A-44).

The special prosecutor moved for rehearing with a suggestion that the matter be heard en banc. (Pet. App. A-47). The court granted the suggestion for en banc consideration but denied rehearing. (*Id.*) Rather, the en banc court, with Judge Selya withholding concurrence, issued an opinion as an addendum to, and modification of, the panel opinion while allowing the panel's opinion and order thus modified to stand. *Id.*

The en banc addendum opinion, in what the court described as dictum (Pet. App. A-49), suggested that publishers subject to prior restraint orders should make a good faith effort to seek emergency relief. (Pet. App. A-48). In this case, however, the court had no "clear conviction" that emergency relief was available to respondents within the restraints governing the publisher's decision making. (Pet. App. A-49). Also, the court believed it would be unfair, because of the publisher's failure to follow the procedures announced in the addendum opinion, to subject respondents to the sanctions imposed. *Id.*

A petition for writ of certiorari was filed on July 9, 1987. The petition was granted on October 5, 1987.

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SUMMARY OF ARGUMENT

The court, rather than a litigant, has the power to decide cases and controversies. U.S. Const. art. III, § 1. An order of a court with jurisdiction—whether it is right or wrong—is to be obeyed until set aside. *Walker v. City of Birmingham,* 388 U.S. 307, 319-21 (1967); *United States v. United Mine Workers,* 330 U.S. 258, 290-93 (1947); *Howat v. Kansas,* 258 U.S. 181, 189-90 (1922). Invalidity of the order cannot be raised in defense of contempt proceedings for violating it. *Howat v. Kansas,* 258 U.S. at 189-90. These rules apply even though free press rights are implicated. *United States v. Dickinson,* 465 F.2d 496 (5th Cir. 1982).

The circumstances of this case justify the issuance of the order. The facts here are critical.

Patriarca presented the district court with an unusual request: enjoin the media and federal agencies and officials from disseminating and publishing information about his private affairs which was obtained by electronic surveillance in violation of his fourth amendment rights. The materials Patriarca sought to have suppressed had been denied to the Journal in previous litigation. *Providence Journal Co. v. Federal Bureau of Investigation,* 602 F.2d 1010 (1st Cir. 1979), *cert. denied,* 444 U.S. 1071 (1980). A serious, novel issue was raised: Where there is a final judgment denying a newspaper information about an individual's private affairs, and such information was seized in violation of fourth amendment rights, may the newspaper publish that information? The court should have been allowed to take at least a short time to consider the matter. *United States v. United Mine Workers,* 330 U.S. at 290-93.

There can be no excuse for the Journal not requesting, in any court, any stay, vacation or modification of the order. This is especially so where the Journal requested a continuance. The postponement—granted for the Journal's convenience—caused the restraint to be extended.

The Journal essentially, and unlawfully, instituted itself as a tribunal of a higher rank than the district court. Although it had no power to do so, the Journal determined that its rights were superior to Patriarca's and that it could ignore the district court's order. The contemptuous publication which followed should not be tolerated.

Judicial review and remedies were available. The district court could have been advised by the Journal of a sense of urgency and its conviction that the order was wrong and was to be violated. That message, along with a motion to the district court to vacate, may have obtained relief for the Journal. Likewise, the Journal should have applied for redress with the court of appeals by petition for writ of mandamus[3] or appeal. *In re San Juan Star Co.,* 662 F.2d 108, 112-13 (1st Cir. 1981). "It cannot be presumed that the . . . courts would have ignored [respondents'] constitutional claims." *Walker v. City of Birmingham,* 388 U.S. at 319.

There is no exception to the rule requiring compliance with court orders based on degrees of invalidity. The First Circuit's ruling effectively, and incorrectly, invested the Journal with Article III power. It substituted the Journal in place of the district court as the arbiter of Patriarca's lawsuit.

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[3]Judiciary and Judicial Procedures, ch. 646, § 1, 62 Stat. 944 (1948) (codified as amended at 28 U.S.C. § 1651(a) (1982 & Supp. III 1985)).

The temporary restraining order, in any event, was not transparently invalid. The Journal presented no legal authority to the court that Patriarca's fourth amendment rights must be sacrificed as the price of the Journal exercising its first amendment rights. The first amendment is not absolute. *Nebraska Press Association v. Stuart,* 427 U.S. 539, 570 (1976). The First Circuit had handed down several rulings which suggested, at least, that the district court have some time to reflect on the issue. Logically, where the question was not easy, the decision to briefly preserve conditions while considering it cannot be considered frivolous.

The issue of whether first amendment protection would apply "no matter how shabby or illegal the means by which the information is obtained, no matter how serious an intrusion on privacy might be involved" is a question at least one justice of this Court has reserved for consideration. *Nebraska Press Association v. Stuart,* 427 U.S. at 617 (Stevens, J., concurring).

Also, *Near v. Minnesota,* 283 U.S. 697 (1931), which defined when prior restraints might be acceptable, left open "questions as to the extent of authority to prevent publications in order to protect private rights. . . ." 283 U.S. at 716 (footnote omitted).

Pending a final decision, trial and appellate courts in the Pentagon Papers cases in New York and Washington, D.C. all stayed publication by newspapers. Publication was stayed in those cases even though the government's injunction request was not based upon any recognized legal grounds for granting a prior restraint. Publication was stayed notwithstanding that the evidence proffered

by the government was insufficient to sustain a prior restraint. In *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976), publication was restricted pending consideration by the courts. Moreover, the district court did essentially what the First Circuit did earlier. The court of appeals previously had stayed an order which would have allowed the Journal to obtain access to and publish the FBI materials regarding Patriarca. *Providence Journal Co. v. Federal Bureau of Investigation,* 595 F.2d 889 (1st Cir. 1979).

There are other examples of prior restraints. Publication of pretrial discovery materials may be restrained. *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 33 (1984). Copyright law permits prior restraints. *Salinger v. Random House, Inc.,* 811 F.2d 90 (2d Cir.), *cert. denied,* — U.S. —, 108 S. Ct. 213 (1987). Federal agencies such as the National Labor Relations Board and the Federal Trade Commission may issue cease and desist orders which infringe upon free speech. *National Labor Relations Board v. Gissel Packing Co.,* 395 U.S. 575, 616-20 (1969); *National Commission on Egg Nutrition v. Federal Trade Commission,* 570 F.2d 157, 162-64 (7th Cir. 1977), *cert. denied,* 439 U.S. 821 (1978). Publication which irreparably harms an individual's business interests has been enjoined. *American Federation of Musicians v. Stein,* 213 F.2d 679 (6th Cir.), *cert. denied,* 348 U.S. 873 (1954).

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ARGUMENT

I. THE COURT HAD AUTHORITY TO ISSUE ITS ORDER AND THAT ORDER SHOULD HAVE BEEN OBEYED.

Courts—not newspapers—are the sole authority to resolve cases and controversies. The district court had the authority to issue the temporary restraining order. The Journal, having elected to take no action to seek lawful relief, should have obeyed it. A litigant may not judge his own case. The Journal had no authority to determine the outcome of its controversy with Patriarca.

A litigant has no power to issue orders to resolve cases. U.S. Const. art. III, § 1; *Ex Parte Pennsylvania,* 109 U.S. 174, 176 (1883);[4] *Jecker v. Montgomery,* 54 U.S. (13 Howard) 498, 515 (1852); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). Where courts have jurisdiction, their orders, however erroneous, are to be obeyed until such orders are vacated or modified. *Walker v. City of Birmingham,* 388 U.S. 307, 319-21 (1967); *United States v. United Mine Workers,* 330 U.S. 258, 290-93 (1947); *Howat v. Kansas,* 258 U.S. 181, 189-90 (1922). People may not bypass orderly judicial review of injunctive orders and disobey them. *Walker v. City of Birmingham,* 388 U.S. at 320. One may not raise in defense of contempt proceedings for violation of an order that the order was invalid. *Howat v. Kansas,* 258 U.S. at 189-90. These rules apply

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[4]Congress alone has the power to determine whether the judgment of a court of the United States, of competent jurisdiction, shall be reviewed or not. If it fails to provide for such a review, the judgment stands as the judgment of the court of last resort, and settles finally the rights of the parties which are involved.

Ex Parte Pennsylvania, 109 U.S. 174, 176 (1883).

even when the injunction prohibits exercise of first amendment rights. *Id.; United States v. Dickinson,* 465 F.2d 496 (5th Cir. 1982).

The Journal effectively made its own determination that (1) its rights were superior to those of Patriarca and, (2) it, not the courts, had the sole authority and power to make such a determination. Exercise of contempt powers enables courts to enforce orders necessary for the proper administration of law and for the protection of the rights of litigants. *Bessette v. W. B. Conkey Co.,* 194 U.S. 324, 333 (1904). The behavior of the Journal which followed its anarchic determinations should not be tolerated.

Courts with jurisdiction[5] have power to issue temporary restraining orders to maintain the status quo to afford the court an opportunity for more complete consideration of the merits of a lawsuit. *United States v. United Mine Workers,* 330 U.S. at 290-93; *see also National Maritime Union v. Aquaslide 'N' Dive Corp.,* 737 F.2d 1395, 1399, 1400 n. 6 (5th Cir. 1984) (this rule applies even where a recent opinion of an appellate court, unknown to the trial court or counsel, would be dispositive). A serious issue was raised as to whether fourth amendment rights and privacy interests may be destroyed by exercise of the media's first amendment rights. It was a novel question —one which deserved at least some brief consideration. *United States v. United Mine Workers,* 330 U.S. at 310-11

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[5]The court had jurisdiction over the parties and subject matter. There never was any dispute that the Journal was properly before the court. There can be no question that the court had jurisdiction to resolve the constitutional claim brought before it. *Bell v. Hood,* 327 U.S. 678, 684 (1946).

(Frankfurter, J., concurring) (where an issue is "complicated and novel" existing conditions may be maintained to allow the necessary time for fair consideration of the question; "[t]o say that the authority of the court may be flouted during the time necessary to decide is to reject the requirements of the judicial process."). Weighing heavily in favor of a brief restraining order was the judicial history regarding these particular FBI materials and the Journal's unsuccessful attempts to procure them. (J.A. 74, 179, Pet. App. A-5-A-9, A-10).

The trial judge, without a citation to some authority on the point, was unconvinced that Patriarca's rights must be secondary to the media's rights. (J.A. 61-62, 63-64, 73, Pet. App. A-17, A-18, A-22). After all, if the fruits of an illegal search and seizure may not be used against a person charged with a crime, the judge reasoned, should such materials be allowed to be used against any other citizen? (J.A. 161-62, Pet. App. A-16). If an action for money damages is an inadequate remedy for one accused of a crime, why should a civil damages action be an adequate remedy for any other victim of unconstitutional invasion of privacy? (Pet. App. A-16). Finally, the judge considered whether the fourth amendment is of any real value if the government may trample on the rights of those it perceives to be its enemies and then transmit the unlawfully obtained information to the free press? (J.A. 160, 161, Pet. App. A-14-A-15, A-16). The trial judge evidently had these questions in mind at the chambers conference. (J.A. 61-62, 73, 83, 160, 161, 162, 174, 182, 186, Pet. App. A-14-A-15, A-16).

Given the judicial history regarding the FBI materials, the novel legal issues, Patriarca's prayer for relief

from irreparable harm and the Journal's request for a continuance, petitioner submits that the trial court had authority to briefly restrain publication.

The Journal should not now be heard to claim that it need not suffer the court's order and need not seek any lawful relief from it. What the Journal did not do before leaving the temporary restraining order conference, or thereafter, was to urge or demand an immediate hearing. (J.A. 167). There is no indication in the record that the court was advised that the Journal intended to publish notwithstanding any order or that there was any sense of urgency. Indeed, and this point cannot be overly emphasized, the Journal asked for a postponement. (J.A. 167, Pet. App. A-3, A-10-A-11, A-13). That request resulted in the extension of the duration of the temporary restraining order. (J.A. 170, R. 1, Ex. A, November 13, 1985 order). What the Journal and Hauser did was decide that they were the ones who would determine the outcome of Patriarca's lawsuit. That behavior is an intolerable contempt. *United States v. United Mine Workers*, 330 U.S. at 294.

United States v. United Mine Workers, supra, affirmed criminal contempt judgments for violation of a district court order. Notwithstanding a serious jurisdictional question, 330 U.S. at 267-68, a temporary restraining order issued which effectively enjoined a coal workers strike. 330 U.S. at 266-67. The order issued two and one-half days before the strike was to begin. 330 U.S. at 290. Defendants ignored the order and the strike occurred. *Id.* As in this case, defendants filed no motion to vacate the order. *Id.* This disregard of the district court's order and the judicial process was not tolerated. *Id.*

> This Court has used unequivocal language in condemning such conduct, and has in *United States v. Shipp*, 203 U.S. 563 (1906), provided protection for judicial authority in situations of this kind.

Id. (footnote omitted).

The Journal has no judicial power, nor should it have as long as the historical mandate "a government of laws and not of men" applies. *United States v. United Mine Workers*, 330 U.S. at 307-09 (Frankfurter, J., concurring) (rule by "fiat of governmental or private power" was rejected by the Founding Fathers; challenge to acts of government must be by orderly process of law). The trial court was acting as fast as reasonably possible—certainly faster than the pace the Journal wanted set. The district court's order deserved respect. 330 U.S. at 311 (Frankfurter, J., concurring).

The Journal and Hauser breached the bedrock rule that court orders, even those destined to be ruled unconstitutional, must be obeyed until amended or vacated. *Walker v. City of Birmingham*, 388 U.S. 307, 319-21 (1967). Notwithstanding the *Walker* pronouncement, the First Circuit has essentially held that in certain circumstances individuals rather than courts are permitted to determine what the law is and how they shall govern themselves. Its ruling contradicts this Court's recent statement that,

> "If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450, 31 S. Ct. 492, 501, 55 L.Ed. 797 (1911).

Young v. United States Ex Rel. Vuitton et Fils S.A., — U.S. —, —, 107 S. Ct. 2124, 2131 (1987).

There is no excuse for disregarding lawful means of seeking redress. Avenues of review were available to the Journal. The First Circuit entertains, in appropriate cases, expedited review of interlocutory orders encroaching on first amendment rights. *In re San Juan Star Co.*, 662 F.2d at 112, 113; *see also San Francisco Real Estate Investors v. Real Estate Investment Trust*, 692 F.2d 814, 816 (1st Cir. 1982) (expedited appeal of temporary restraining order was allowed in extraordinary circumstances). Relief was also available by writ of mandamus. 28 U.S.C. § 1651(a); *Stringfellow v. Concerned Neighbors In Action*, — U.S. —, —, 107 S. Ct. 1177, 1186 (1987) (Brennan, J., concurring) (review of district court orders by a petition for writ of mandamus is appropriate in extraordinary circumstances). If the district court or the court of appeals had been presented with requests for relief, the temporary restraining order may have been dissolved. If the legal question raised by the temporary restraining order request had been capable of only one simple conclusion, the First Circuit duty judge, if asked, presumably would have immediately dissolved the offending offer. "It cannot be presumed that the . . . courts would have ignored [respondents'] constitutional claims." *Walker v. City of Birmingham*, 388 U.S. at 319.

The fact that the temporary restraining order restricted first amendment rights does not exempt the Journal from the rule requiring compliance with court orders. *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1982). In that case the district court ordered news reporters not

to publish testimony given in a criminal trial, 465 F.2d at 500; that order was violated by publication and the reporters were held in criminal contempt. *Id.* On appeal, the Court of Appeals for the Fifth Circuit held that the gag order was "constitutionally unacceptable, and hence illegal." 465 F.2d at 509. Nevertheless, the Fifth Circuit held that a person must obey orders of a court with jurisdiction and that invalidity of the order, even where the invalidity is of constitutional proportions, may not be a defense to contempt charges. *Id.* The Fifth Circuit remanded the case to the district court to determine whether the contempt judgment or the punishment was appropriate in light of the unconstitutionality of the order. 465 F.2d at 514.

In support of its conclusion that the temporary restraining order could be violated and the order's invalidity raised as a defense to the criminal contempt charges, the First Circuit applied to this case the principle that even brief restraint of first amendment rights constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (Pet. App. A-43-A-45). That pronouncement seems to be of no consequence in this matter, however, given the facts of this case. The Journal endured no immediate delay of its rights. Although its editor did not want to miss one edition of the Journal due to the temporary restraining order, this sense of urgency was not communicated to the court. In any event, the newspaper had until 10:30 p.m., about ten hours after the order issued, to determine if it wanted to publish in violation of the order. (J.A. 123, 150). The Journal did not, therefore, suffer

immediate delay or immediate harm due to the temporary restraining order.[6]

The court of appeals found the November 13, 1985 order lacking because the record discloses no factual determinations made by the judge at the chambers conference that the restraint would accomplish its goals and that no less restrictive measures were available. (Pet. App. A-41, A-45).[7] The need for such findings seems less important

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[6]Even if the principle that the briefest of restrictions on publication would be an intolerable violation of free speech was to apply here, petitioner asserts that the Journal should be estopped from now asserting such an argument. This estoppel arises from the Journal's rejection of the court's offer for a speedy hearing, its request for a postponement and the fact that no stay was requested. The Journal's actions and inactions amount to a waiver of the belated claim that the Journal's free speech rights were irreparably harmed during each moment following issuance of the order.

See Snepp v. United States, 444 U.S. 507 (1980). There the Court affirmed a judgment which, in part, enjoined a former Central Intelligence Agency agent from publishing information learned by him during his CIA service until after prepublication review and approval by the CIA. That restriction was grounded on a covenant in the agent's employment contract where he agreed "not to disclose any classified information relating to the Agency without proper authorization." 444 U.S. at 507-08 and 508 n. 1. In essence, Snepp apparently was considered to have contracted away his first amendment right to publish CIA information without prior CIA consent. *See* 444 U.S. at 509 n. 3, 511 and 444 U.S. at 520, n. 10, 524-25, 526 (Stevens, J., dissenting).

[7]There is no transcript of the proceedings during the November 13, 1985 chambers conference. (J.A. 184). Patriarca's counsel testified that the court at the chambers conference was putting the matter in a "holding pattern." (J.A. 172). The court wanted a few hours to reflect on the matter. (J.A. 171). In its opinion holding the Journal and Hauser in contempt, the trial court made it clear that the temporary restraining order issued

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or offensive to the Journal's rights inasmuch as the Journal was requesting a postponement.[8]

The Journal's articles about Patriarca were not "time bound."[9] This case is not one where a newspaper was restrained from publishing news about an imminent election, for example. The court in *United States v. Dickinson, supra,* required compliance with a gag order but it conditioned that ruling on the existence of adequate and effective remedies for orderly review of the offending order. 465 F.2d at 511. The Journal cannot be thought to be deprived of adequate or effective remedies. It did not even try to seek lawful redress. Because it sought no stay or review (J.A. 36), it did not experience frustration or

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to maintain the status quo. (Pet. App. A-10-A-11, A-18). The court stated that if the order did not issue, publication would make the matter moot. (Pet. App. A-10-A-11, A-18). Also, on November 18, 1985, when delivering a bench decision on the preliminary injunction, the trial court made reference to issuing the temporary restraining order in order to preserve the status quo. (J.A. 73).

[8]Furthermore, despite the court's request, the FBI materials were never produced by the Journal for the court's inspection. (J.A. 60, 143, Pet. App. A-17). There was, therefore, an "aura of mystery" about the FBI materials. (J.A. 60). The government produced the materials to the court but that was well after the November 13, 1985 conference. (J.A. 143, 200 (November 19, 1985 entry), 203 (January 10, 1986 entry), 241).

[9]Rather than being time bound, the Journal's news story is about personal conversations between a young man and his father which occurred more than twenty years earlier. (J.A. 39, 45-48, 49, 55-57). Indeed, one can conclude that the Journal did not believe the Patriarca story was newsworthy in terms of necessity to hastily publish. (*See* Pet. App. A-43). The Journal had received the FBI materials some months before the temporary restraining order issued (J.A. 96, 132, 133), but it felt no need to rush it into print. (J.A. 142-43).

delay due to the lawful judicial process. In these circumstances it should not be excused from disobeying the temporary restraining order.[10]

It is certainly true that prior restraints are disfavored. *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971). The press therefore has broad, but not unlimited, power.[11] *Near v. Minnesota,* 283 U.S. 697, 708, 716 (1931);

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[10]In *Walker v. City of Birmingham,* 388 U.S. 307 (1967), the Court upheld criminal contempt judgments for violation of an injunction prohibiting a march against racial discrimination. The Court made it clear that it was influenced by the fact that two days passed between the time the injunction issued and the planned march yet no effort was made to obtain relief from the order. 388 U.S. at 318. The Court stated that:

> This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with *delay* or *frustration* of their constitutional claims.

Id. (emphasis added). *See also United States v. Dickinson,* 465 F.2d at 512 (timeliness of publication is important but where there is no showing that the appellate process was slow or stalled, violation of a gag order, without resort to judicial remedies, will not be tolerated).

Several commentators have suggested that before a violation of an invalid order can be excused, at least some attempt at lawful review must be made; if no relief is quickly provided, then collateral attack of the order's invalidity at contempt proceedings may be permissible. Cox, *The Void Order and the Duty to Obey,* 16 U. Chi. L. Rev. 86, 113 (1948); Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart,* 29 Stan. L. Rev. 497, 509-10 (1977).

[11]In *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976), the Court suggested that the wide latitude for freedom of the press implies a concomitant duty, "something in the nature of a fiduciary duty," to exercise that right responsibly. 427 U.S. at 560.

Nebraska Press Association v. Stuart, 427 U.S. 539, 570 (1976). No precedent exists, however, for making the power of the press equivalent to or a substitute for judicial authority.

If an order is clearly wrong, it is there that the judicial process of an orderly and civilized society ought to begin, not end. "[R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom." *Walker v. City of Birmingham*, 388 U.S. at 321.

The First Circuit's opinion has sent a signal to the people, a signal which, given the contemnors before it, is not limited to distribution only via the Federal Reporter. The First Circuit's message seems clear: when one firmly and sincerely disagrees with a court mandate, one is at liberty to make her or his own determination regarding that order's validity and ignore it if that is what she or he desires to do. An orderly society requires respect for the courts which are entrusted by it to lay down the law. *United States v. United Mine Workers*, 330 U.S. at 312 (Frankfurter, J., concurring). Where one is permitted to ignore the court's lawful authority, the rights, protections and privileges of others may be destroyed. *Id.* "[N]o man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics or religion." *Walker v. City of Birmingham*, 388 U.S. at 320-21.

If there were clear judicial precedent, the trial court's task would have been easier. For example, if the court had been confronted with a motion by a defendant in a criminal case seeking to enjoin publication, the court would

have had ample guidance. Criminal defendants' sixth amendment rights may be safeguarded in a variety of ways from a newspaper's exercise of its first amendment rights. *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). *See also In re Globe Newspaper Co.*, 729 F.2d 47 1st Cir. 1984) (bail hearings, notwithstanding the public's first amendment right of access, were closed to protect the defendants' *privacy* and fair trial rights until defendants had a fair opportunity to challenge the validity of FBI electronic surveillance). There have been no guidelines set yet, at least none which were brought to the court's attention, which might safeguard Patriarca's privacy interests. Likewise, there was no precedent, at least none provided by the Journal, instructing the court that Patriarca's rights had to be sacrificed so that the Journal's rights might be exercised.

Trial courts when faced with requests for injunctions do not have the luxury of much time to reflect on novel legal issues. Undoubtedly the trial court would have liked at least a few hours to consider applicable law. (J.A. 171, Pet. App. A-17). Trial judges can only be expected to do their best. An orderly society requires respect for such efforts. *United States v. United Mine Workers*, 330 U.S. at 290-93. Where an injunction is issued in the circumstances of this case, that is, where legal issues are being fairly and swiftly considered, it should not be subject to being labeled "transparently invalid" and written off as a complete nullity.

Certainly if the injunction issued in *Walker* should have been obeyed, the order issued in the circumstances of this case is worthy of respect. In *Walker* the Court upheld

the Alabama rule that court orders must be obeyed until set aside and the invalidity of an order cannot be raised as a defense to criminal contempt proceedings. That case affirmed criminal contempt judgments against marchers against racial discrimination who were enjoined from picketing without a permit.

After stating that the court issuing the injunction had jurisdiction, the *Walker* Court added, "And this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity." 388 U.S. at 315. From this dicta the court of appeals has gleaned an exception to the rule requiring people to obey court orders.[12] (Pet. App. at A-33). The First Circuit's opinion holds that a "transparently invalid" order cannot form the basis for a contempt citation (Pet. App. A-33, A-45-A-46) and one may challenge the validity of a transparently invalid order at contempt proceedings. (Pet. App. A-45). No precise definition of transparently invalid is offered. (Pet. App. A-35). The First Circuit's opinion essentially equates transparently invalid with lack of jurisdiction[13] (Pet. App.

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[12]The First Circuit is not the only authority which concludes that *Walker* provides that orders which are "transparently invalid" may be disobeyed and challenged collaterally in defense of criminal contempt charges. *See, e.g., Glen v. Hongisto,* 438 F. Supp. 10, 15 (N.D. Calif. 1977); Barnett, *The Puzzle of Prior Restraint,* 29 Stan. L. Rev. 539, 555 (1977); Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart,* 29 Stan. L. Rev. 497, 509 (1977). It is open to question whether these authorities would reach this conclusion if presented with the facts of this case.

[13]All of the cases mandating compliance with orders until they are set aside require that personal and subject matter jurisdiction exist. *See, e.g., Walker v. City of Birmingham,* 388 U.S. 307, 315, 319-21 (1967); *United States v. United Mine Workers,* 330 U.S. 258, 290-94 (1947); *Howat v. Kansas,* 258 U.S. 181, 189-90 (1922).

A-34) and concludes that one need not obey a transparently invalid order.[14] (Pet. App. A-45-A-46).

The rule recited in *Walker,* which was adopted from *Howat v. Kansas,* 258 U.S. at 189-90, contains no transparently invalid exception. 388 U.S. at 314. Significantly, the *Walker* Court repeated the *Howat* language:

> An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, *must be obeyed* by them *however erroneous the action of the court may be,* even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. *It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed* for error by orderly review, either by itself or by a higher court, *its orders* based on its decision *are to be respected,* and disobedience of them is contempt of its lawful authority, to be punished. 258 U.S., at 189-190.

388 U.S. at 314 (emphasis added).

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[14]The First Circuit's en banc addendum opinion suggests in dictum (Pet. App. A-49) that a publisher should "make a good faith effort to seek emergency relief from the appellate court." (Pet. App. A-48). If timely relief is not forthcoming from the appellate court, then a newspaper may publish and, if charged with criminal contempt, challenge the order at those proceedings. (*Id.*). This dictum is simply a recitation of the teachings of *Walker v. City of Birmingham,* 388 U.S. 307 (1967), and *United States v. Dickinson,* 465 F.2d 496 (5th Cir. 1982): orders restricting first amendment rights must be obeyed at least until the party restrained meets with frustration or delay by the appellate process. Since the First Circuit's dictum simply followed the existing law, the Journal's behavior should not have been condoned. The judgment of conviction should not have been reversed.

The *Walker* injunction was issued *ex parte*. 388 U.S. at 309-10, 319. It issued pursuant to a Birmingham, Alabama statute which "would *unquestionably* raise *substantial* [first amendment] issues." 388 U.S. at 316 (emphasis added). Indeed, that ordinance was eventually stricken down as unconstitutional on its face. *Shuttlesworth v. City of Birmingham,* 394 U.S. 147 (1969).

The Court took as fact the contemnors' allegations that the ordinance in the past had been administered in an arbitrary and discriminatory fashion. 388 U.S. at 317-18. A representative of one of the leaders of the marchers attempted to apply for a parade permit and was "rudely rebuffed." 388 U.S. at 317, n. 9, 325 (Warren, C.J., dissenting), 335 (Douglas, J., dissenting) and 339 (Brennan, J., dissenting). Upon arriving at the Birmingham City Hall she was directed to Commissioner Eugene "Bull" Connor. The march representative testified that, "He said, 'No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail,' and he repeated that twice." 388 U.S. at 317 n. 9. Two days later a telegram by Reverand Shuttlesworth, one of the marchers' leaders, was sent to Commissioner Connor requesting a permit to picket. 388 U.S. at 335-36 (Douglas, J., dissenting). Commissioner Connor responded the same day with a telegram "insist[ing]" that there be no picketing. 388 U.S. at 336 (Douglas, J., dissenting) and 339-40 (Brennan, J., dissenting). With this background, it is understandable that the administration of the parade ordinance was considered to be arbitrary and discriminatory.

The *Walker* injunction suffered not only from being issued pursuant to an ordinance of suspect constitutional

validity on its face and suspect application to the Birmingham marchers, but also, as the Court noted, "The breadth and vagueness of the injunction itself would also *unquestionably* be subject to *substantial* constitutional question." 388 U.S. at 317 (emphasis added). Nevertheless, the *Walker* injunction was not considered transparently invalid and the contemnors were not excused from exhausting legal avenues of review. *Walker* did not analyze the injunction in terms of whether on the merits it was transparently invalid or not. Rather, that case held that where the contemnors ignored any and all opportunities for orderly judicial review, no collateral review was available. 388 U.S. at 318-21.

If the order in *Walker* should have been obeyed, by comparison the order in this case certainly was authorized and should have been obeyed. Chief Judge Boyle had just several weeks before the November 13, 1985 chambers conference attended the First Circuit Judicial Conference in Puerto Rico where one of the lectures dealt with the emerging and perplexing issue of constitutional privacy rights conflicting with the media's right of free speech. (J.A. 73, 174, 182). To illustrate the novelty of the question raised, one need only note that the Journal objected to the court scheduling a hearing within twenty-four hours and requested a continuance in order to gather and present authorities. (J.A. 167, Pet. App. A-3, A-10-A-11, A-13). The trial judge was concerned about Patriarca's fourth amendment privacy rights being completely destroyed by publication. (J.A. 174, *see also* J.A. 73, 182, Pet. App. A-10, A-18).

It is in this setting that the trial judge issued the temporary restraining order. In these circumstances, peti-

tioner submits, the trial judge was acting within his authority when he briefly restrained publication. Patriarca's case should have been resolved by the district court's determination—not by the appellate review exercised by the Journal and Hauser.

II. THE TEMPORARY RESTRAINING ORDER WAS NOT "TRANSPARENTLY INVALID."

The question facing the trial court was novel, serious and difficult. Restrictions on speech are not unprecedented. The temporary restraining order was not frivolous or transparently invalid.

Petitioner takes the position that the rule against violation of orders issued by courts with jurisdiction contains no exception based on degrees of invalidity of such orders.[15] Even if there is such an exception, it does not apply here. There are a variety of reasons why this brief restraint was not frivolous or transparently invalid.

Patriarca suffers no less because the FBI, which was prohibited by an Act of Congress[16] from willfully disclos-

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[15]The rule necessitating compliance with court orders upon peril of criminal contempt sanctions is conditioned upon the court having jurisdiction. Courts have jurisdiction to determine their jurisdiction and even if ultimately the court later finds that jurisdiction is lacking, orders outstanding until that time must be obeyed. *United States v. United Mine Workers*, 330 U.S. at 292. If there is any exception to the general rule, petitioner submits that it arises only where there might be lack of jurisdiction due to be bad faith of the court. *See* 330 U.S. at 292 n. 57. There can be no question that in this case the court exercised its authority in a laudable good faith effort to do justice to all parties.

[16]18 U.S.C. §§ 2511(1), 2520; *Providence Journal Co. v. FBI*, 602 F.2d at 1013-14.

ing the information, handed off the illegally obtained materials to the Journal. The Journal, as a party to the prior litigation, presumably knew very well of the First Circuit's rulings regarding the materials in question. (Pet. App. A-3). It nevertheless resumed its efforts to obtain the information about Patriarca which was constitutionally protected.[17] By doing so the Journal enlisted the FBI in a "tag-team" assault on Patriarca's privacy rights. On November 13, 1985 the issue appeared to be momentous and its resolution was not obvious. The court's reaction to these circumstances, therefore, cannot be considered to be frivolous.

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), established guidelines for accommodating free press rights while safeguarding the right to a fair trial of one charged with a crime. Of interest from that case are Justice Stevens' comments in his concurring opinion. He believed that the judiciary is able to protect a criminal defendant's right to a fair trial without gagging the press, and that it may not do so. 427 U.S. at 617 (Stevens, J., concurring). Significantly, he specifically left open the

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[17]Although in 1976 the FBI, in deference to individual privacy interests, opted not to honor the Journal's request for the Patriarca materials (J.A. 214-16), *Providence Journal Company v. FBI*, 602 F.2d at 1011, in 1985 it accommodated the Journal's renewed request. (J.A. 96), *Patriarca v. FBI*, 639 F. Supp. 1193, 1195 (D.R.I. 1986). It should be recalled that in response to the Journal's 1976 efforts to obtain the FBI materials, the courts would not allow access to private matters concerning Raymond L. S. Patriarca or his living family members. *Providence Journal Company v. FBI*, 460 F. Supp. at 789-90, *aff'd*, 602 F.2d 1010, 1012, 1015. Assuming that the FBI was acting in good faith in 1985, apparently the materials were proffered by mistake. *Patriarca v. FBI*, 639 F. Supp. at 1196.

question of whether the same absolute first amendment protection would apply

> no matter how shabby or illegal the means by which the information is obtained, no matter how serious an intrusion on privacy might be involved, no matter how demonstrably false the information might be, no matter how prejudicial it might be to the interests of innocent persons, and no matter how perverse the motivation for publishing it . . .

Id. Similarly, *Near v. Minnesota,* 283 U.S. 697 (1931), while broadly condemning prior restraints, carefully left open "questions as to the extent of authority to prevent publications in order to protect private rights. . . ." 283 U.S. at 716 (footnote omitted).

As Mr. Justice Frankfurter explained, "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 441 (1957). Rather, what he favored was a " 'pragmatic assessment of its operation in the particular circumstances.' " 354 U.S. at 442 (citation omitted). Chief Judge Boyle was preserving the status quo while he invited counsel to help him in an unprecedented legal setting to make a reasoned, pragmatic assessment of the facts and law in these particular circumstances.

The First Circuit seems to have viewed the temporary restraining order interchangeably with the ultimate merits of the preliminary injunction request. That is, the court of appeals seems to focus not on whether the restraining order was frivolous, but rather whether a more permanent prohibition would have been justified.[18]

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[18]A temporary restraining order and a preliminary injunction are significantly different. *See generally* 7 Moore's Federal

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The court of appeals began its explanation of why the district court's order was transparently invalid by stating that this Court has never upheld a prior restraint on pure speech. (Pet. App. A-37). The court then invoked *New York Times Co. v. United States,* 403 U.S. 713 (1971). (Pet. App. A-37). While that case denied a request to enjoin publication, it is nevertheless an instance where brief restraints to publication were issued to afford limited time for judicial review. 403 U.S. at 714. In this respect the trial court here did exactly what was done in *New York Times Co. v. United States, Id.*

Short prior restraints on pure speech are not unprecedented. The Pentagon Papers cases are perhaps the best examples of temporary prior restraints imposed in order to maintain the status quo while courts quickly consider the merits of a publication injunction request. In those cases the government brought actions in the United States District Courts for the District of Columbia and the Southern District of New York to enjoin newspapers from publishing materials derived from a Pentagon study regarding this country's military involvement in Southeast Asia. *United States v. Washington Post Co.,* 446 F.2d 1327 (D.C. Cir.) (en banc), *aff'd,* 403 U.S. 713 (1971); *United States v. New York Times Co.,* 328 F. Supp. 324 (S.D.N.Y.), *rev'd,* 444 F.2d 544 (2d Cir.) (en banc), *rev'd,* 403 U.S. 713 (1971). The government alleged in those cases that disclosure of the Pentagon Papers would create

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Practice, Part 2, ¶ 65.05 (2d ed. 1986). A temporary restraining order is designed to hold matters in status quo for a short period of time so that a more complete hearing and presentation of evidence can be made.

a "grave and irreparable danger" to national security. *New York Times Co. v. United States*, 403 U.S. 713, 732 n. 2 (1971) (White, J., concurring).

In New York the district court granted a temporary restraining order pending the hearing on the government's motion for preliminary injunction, *United States v. New York Times Co.*, 328 F. Supp. at 325, but denied the motion for preliminary injunction after reviewing evidence and determining that it was insufficient to sustain the government's request. 328 F. Supp. at 331. Even though the trial judge denied the motion for preliminary injunction, he continued the temporary restraining order until the government could seek a stay from the Court of Appeals for the Second Circuit. *Id.* That court issued a stay, and later ordered the case remanded for further evidentiary review within two days with the stay to remain in effect until that time. *United States v. New York Times Co.*, 444 F.2d at 544.

In the District of Columbia, the district judge rejected the government's preliminary injunction request and the court of appeals affirmed. *United States v. Washington Post Co.*, 446 F.2d at 1328. Nevertheless, stays were granted as the litigation proceeded up the judicial ladder. 446 F.2d at 1329.

Finally, this Court issued a stay which briefly restrained publication. *New York Times Co. v. United States*, 403 U.S. at 714. At each stage in the Pentagon Papers cases, the *Times* and *Post* respected the restraining orders and stays.[19]

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[19]If the *Times* or the *Post* had published notwithstanding this Court's stay, they could have been held in contempt of this

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The Pentagon Papers cases were not "troopship" situations. *New York Times Co. v. United States*, 403 U.S. at 726-27 (Brennan, J., concurring); *Near v. Minnesota*, 283 U.S. at 716. The government's argument in the Pentagon Papers cases did not rest upon any recognized exception to the rule against prior restraints. *Id.* Even though factual determinations had been resolved against any finding of clear and present danger, publication was nevertheless restrained so that the novel legal issues raised by the government could be considered. The trial court in this case did no more than that which was done in the Pentagon Papers cases.

Nebraska Press Association is another case where several lower courts permitted restrictions on the press pending review of an issue theretofore unresolved by this Court. 427 U.S. at 542, 543, 544, 545. Pending review on certiorari, this Court denied a stay of the order which restricted the media's first amendment rights. *Nebraska Press Association v. Stuart*, 423 U.S. 1027 (1975); *see also Nebraska Press Association v. Stuart*, 423 U.S. 1327, 1332, 1333-34 (1975) (Blackmun, Circuit Justice 1975) (stay denied in part on motion to Justice Blackmun as Circuit Justice).

Where the media was restrained from publishing while the *Nebraska Press Association* case was being considered by the courts, the trial court in this case can hardly be

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Court. *Merrimack River Savings Bank v. City of Clay Center*, 219 U.S. 527, 535-36 (1911); *United States v. Shipp*, 203 U.S. 563, 572 (1906); *but see Young v. United States Ex. Rel. Vuitton et Fils S.A.*, — U.S. at —, 107 S. Ct. at 2146 (Scalia, J., concurring).

faulted for its brief order. In *Nebraska Press Association* the courts were presented with an unresolved conflict of important constitutional rights. 427 U.S. at 551, 570. Here, the district court was being asked to reconcile important constitutional rights. In *Nebraska Press Association* the Court noted that the authors of the Bill of Rights did not set priorities between the first and sixth amendments. 427 U.S. at 561. Similarly, no priorities are evident between the first and fourth amendments. Finally, the district court's order should be analyzed under the admonition that

> this Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.

Nebraska Press Association v. Stuart, 427 U.S. at 570 (citations omitted).

A final example of a court issuing a stay pertaining to publication, or at least access to information, is *Providence Journal Co. v. Federal Bureau of Investigation,* 595 F.2d 889 (1st Cir. 1979). That case involved the identical FBI materials as were implicated by Patriarca's complaint filed on November 8, 1985. No doubt the trial court had that case in mind when weighing the motion for injunctive relief. (Pet. App. A-7-A-8). In *Providence Journal Co. v. Federal Bureau of Investigation, supra,* the Court of Appeals for the First Circuit considered motions by Raymond L. S. Patriarca, an intervenor, and the FBI for a stay, pending appeal, of an order granting the Journal access to the FBI's illegally obtained materials. The district court had granted only a brief stay as it thought that anything longer would be a prior restraint. 595 F.2d at

890. The court of appeals balanced the Journal's right of access and publication against movants' rights. *Id.* The court held that a denial of a stay would irreparably harm Patriarca, destroy the status quo and moot the appeal. *Id.* Granting the stay, however, would simply postpone publication—assuming that the district court's order survived appellate review—during the time that the appeals were considered. *Id.*

This ruling, while not as close as the Pentagon Papers or *Nebraska Press Association* cases to the factual situation presented here, was certainly bound to influence the trial court. With this history it is understandable that the district court would have issued its temporary restraining order. Given the First Circuit's ruling on the stay, and its ultimate decision preventing the Journal access to the FBI materials, *Providence Journal Co. v. Federal Bureau of Investigation,* 602 F.2d 1010 (1st Cir. 1979), *cert. denied,* 444 U.S. 1071 (1980), the trial court's November 13, 1985 order should hardly be considered frivolous or transparently invalid.

Instances of restraints imposed in analogous situations provide support for the trial court's order in this case. In order to protect privacy rights, a newspaper may be ordered not to publish information obtained via pre-trial discovery. *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 32, 33 (1984); *In re San Juan Star Co.,* 662 F.2d 108, 115 (1st Cir. 1981). Once a newspaper litigant obtains possession of discovery materials, its position is substantially the same as the Journal's. In the same way that newspaper litigants have no first amendment right of access to pre-trial discovery, *Seattle Times Co. v.*

Rhinehart, 467 U.S. at 32, the Journal had no right of access to the FBI materials. *Providence Journal Co. v. Federal Bureau of Investigation*, 602 F.2d at 1013-14. If publication can be forbidden regarding pretrial discovery materials, the trial court in this case was justified in issuing the brief restraining order.

Copyright law offers another example of permissible prior restraints. *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), *cert. denied*, — U.S. —, 108 S. Ct. 213 (1987). Even where copyrighted information is factual and newsworthy, one's expression may be protected from use by another. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561, 564 (1985). Copyright law protects the author's right to publish first or not at all. 471 U.S. at 551, 552, 553. Likewise, the confidentiality of an author's expression is protected by copyright law. 471 U.S. at 564, *see also* 471 U.S. at 559-60 (an individual has a first amendment right, as well as a right under copyright law, not to speak publicly).

If Patriarca had a copyright to his taped conversations, he would be entitled to a prior and permanent restraint against the Journal's use of his expression. *Salinger v. Random House, Inc.*, 811 F.2d at 94. Common law copyright has often been used to protect personal privacy.[20] *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. at 554, citing Brandeis & Warren, *The Right of*

[20]Ironically, if Patriarca, rather than the FBI, taped and copyrighted his conversations, there would be little doubt that to protect his privacy the court would have authority to enjoin publication at least of Patriarca's verbatim expression; *See Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. at 551, *Salinger v. Random House, Inc.*, 811 F.2d at 94, 100.

Privacy, 4 Harv. L. Rev. 193, 198-99 (1890). Unless or until a person communicates his private expressions to the public, there may be no publication of those expressions by another without his consent. *Id.*

Courts, by custom, rules of evidence and procedure, regulate and restrict free speech in courtrooms and to and between sitting jurors. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 104 n. 21 (1981). The Court of Appeals for the First Circuit even prohibits *post*-verdict interviews by counsel, litigants or their agents with jurors except in extraordinary circumstances and then only under the supervision of the trial judge. *United States v. Kepreos*, 759 F.2d 961, 967 (1st Cir.), *cert. denied*, — U.S. —, 106 S. Ct. 227 (1985); *but see Craig v. Harvey*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941) (out of court statements regarding pending cases could not be considered a clear and present danger to the administration of justice and were not contemptuous).

Federal agencies in certain circumstances are empowered to issue orders amounting to prior restraints. *New York Times Co. v. United States*, 403 U.S. at 731 n. 1 (White, J., concurring). Under 29 U.S.C. § 160(c), the National Labor Relations Board may issue cease and desist orders to prevent unfair labor practices.[21] *See, e.g., National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575, 616-20 (1969) (while an employer's first amendment rights are firmly established, 395 U.S. at 617,

[21]National Labor Relations Act, ch. 372 § 10(c), 49 Stat. 453 (1935) (codified as amended at 29 U.S.C. § 160(c) (1982 & Supp. III 1985)).

the NLRB may prohibit him from expressing any "threat of reprisal or force or promise of benefit" when communicating with his employees, 395 U.S. at 617, 618); *Associated Press v. National Labor Relations Board*, 301 U.S. 103 (1937) (the press was not immune from NLRB regulation notwithstanding a first amendment challenge, 301 U.S. at 131, 132-33 and 138 (Sutherland, J., dissenting)). Likewise, under 15 U.S.C. § 45(b), the Federal Trade Commission may issue orders enjoining unfair trade practices.[22] *See, e.g., National Commission on Egg Nutrition v. Federal Trade Commission*, 570 F.2d 157, 162-64 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978) (the FTC may prohibit false or misleading commercial speech); *see also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1975) (the first amendment does not prohibit a state from prohibiting untruthful commercial speech).

A final example to illustrate that the temporary restraining order was not so totally lacking in merit as to be considered frivolous and transparently invalid is *American Federation of Musicians v. Stein*, 213 F.2d 679 (6th Cir.), *cert. denied*, 348 U.S. 873 (1954).[23] There the

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[22]Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914) (codified as amended at 15 U.S.C. § 45(b) (1982 & Supp. III 1985)).

[23]The second paragraph on page 12 of the petition for certiorari reads:

> In *American Federation of Musicians v. Stein, supra*, a union was restrained from publication of plaintiff's name in the union's magazine on an "unfair" agents

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court of appeals affirmed an injunction prohibiting publication of the name of a musician's booking agent by a musicians' union in its magazine's "unfair" agents list. The agent was considered to be threatened with irreparable harm from the publication. 213 F.2d at 680, 682, 683, 689. The union argued that the first amendment denied the district court the power to enjoin publication. 213 F.2d at 680. The Sixth Circuit held that circulation of Stein's name on the unfair list was not an expression of opinion. 213 F.2d at 689. It therefore was not protected speech. The first amendment argument was rejected.[24] *Id.* "The law does not allow a citizen's rights to be destroyed under a perversion of freedom of speech." *Id.* (citation omitted).

The First Circuit held that the only potential danger from publication of the FBI materials was to an individ-

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> list. A *criminal contempt judgment for violation of the order was upheld.* The First Circuit is therefore also in conflict with the Sixth Circuit.

(emphasis added). The emphasized statement is incorrect.

A review of *American Federation of Musicians v. Stein, supra*, reveals that in that case there was no violation of the order or criminal contempt proceedings.

This error was discovered while petitioner's counsel was preparing petitioner's brief. The Clerk and respondent's counsel were immediately informed of this error. The authors apologize to the Court, respondents and their attorneys for this mistake.

[24]*Cf. Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911) (defendants who were convicted of contempt charges for violation of an order enjoining continuation of a boycott raised freedom of speech and of the press as a defense, 421 U.S. at 436; the constitutional issue was not decided since the injunction by its terms did not restrict publication, 421 U.S. at 436-37; but, the rule was recognized that where publication is used to continue an unlawful boycott, publication may be enjoined, 421 U.S. at 437).

ual's privacy interest. (Pet. App. A-45). The First Circuit held that a subsequent damages action would be adequate protection against such harm. *Id.* Stein was not restricted to a subsequent damages action. He was successful in preventing publication of his name in order to protect his opportunities for future musicians' bookings. The order issued on Patriarca's request for protection of his privacy is similar enough to the *American Federation of Musicians* order that it should have been obeyed.

CONCLUSION

The judgment of the court of appeals (A. 1), insofar as it reversed the criminal contempt conviction of the Journal and Hauser, should be reversed and the matter should be remanded to the district court for execution of the penalties imposed. (Pet. App. A-23-A-26).

Respectfully submitted,

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November 1987

APPENDIX

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1336

IN THE MATTER OF APPLICATION TO
ADJUDGE THE PROVIDENCE JOURNAL
COMPANY AND ITS EXECUTIVE EDITOR,
CHARLES M. HAUSER, IN CRIMINAL CONTEMPT,

PROVIDENCE JOURNAL COMPANY AND
CHARLES McC. HAUSER,

Appellants.

JUDGMENT

Entered: December 31, 1986

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court finding the Providence Journal Company and its executive editor, Charles M. Hauser, in criminal contempt is reversed.

Certified and issued as informal mandate under F.R.A.P. 41 on May 20, 1987.

Francis P. Scigliano

By: /s/ Richard W. Gordon
Chief Deputy Clerk

By the Court:
Francis P. Scigliano

Clerk.

[cc: Messrs: Abrams, Elliott, Goodale, Curran and Ms. Keats]

U.S. Constitution

Article III, § 1

Supreme Court and inferior courts—Judges and compensation.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Crimes and Criminal Procedure, ch. 645,
§ 1, 62 Stat. 701 (1948) (codified
as amended at 18 U.S.C. § 401(3)
(1982 & Supp. III 1985))

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—

• • •

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Federal Trade Commission Act,
ch. 311, § 5, 38 Stat. 719 (1914)
(codified as amended at
15 U.S.C. § 45(b) (1982 &
Supp. III 1985)).

(b) *Procedure by Commission.* Whenever the Commission shall have reason to believe that any such persons, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof

would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing Commission shall be of the opinion that the method of competition or the act, or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the

public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after the service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. "The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request."

Freedom of Information Act, P.L. 89-487,
80 Stat. 250 (1966) (Codified as amended
at 5 U.S.C. § 552 (1982 & Supp. III 1985))

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copy-

ing current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public inetrest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fees are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two

hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) [Repealed]

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such

appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request,

the court may retain jurisdiction and allow the agency additional time to comp'ete its review of the records. Upon any determinatio oy an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title [5 USCS § 552b]), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological or geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its

pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the rea-

son for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Judicial Code, ch. 231 § 240,
36 Stat. 1157 (1948) (codified
as amended at 28 U.S.C. § 1254(1)
(1982 & Supp. III 1985))

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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Judiciary and Judicial Procedures, ch. 646,
§ 1, 62 Stat. 944 (1948) (codified as
amended at 28 U.S.C. § 1651(a)
(1982 & Supp. III 1985))

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

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National Labor Relations Act, ch. 372
§ 10(c), 49 Stat. 453 (1935) (codified
as amended at 29 U.S.C. § 160(c) (1982
& Supp. III 1985))

• • •

(c) *Reduction of testimony to writing—Findings and orders of Board.* The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state

its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organizations, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and [sic] order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

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Omnibus Crime Control and Safe Streets Act,
P.L. 90-351, 82 Stat. 213 (1968) (Codified
as amended at 18 U.S.C. § 2511(1) (1982
Supp. III 1985))

(1) Except as otherwise specifically provided in this chapter any person who—

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communications;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such persons knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or elec-

tronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

Omnibus Crime Control and Safe Streets Act,
P.L. 90-351, 82 Stat. 223 (1968) (Codified
as amended at 18 U.S.C. § 2520 (1982 &
Supp. III 1985))

(a) In General.—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief.—In an action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of Damages.—(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the

communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of—

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) DEFENSE.—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) LIMITATION.—A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

Supreme Court, U.S.
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No. 87-65

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

PROVIDENCE JOURNAL COMPANY AND CHARLES M. HAUSER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the district court properly held respondents, a newspaper and its executive editor, in criminal contempt for publishing material in violation of a temporary restraining order that was entered pending a hearing on a motion for a preliminary injunction, where respondents failed to seek emergency review of the temporary restraining order.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The prosecution of criminal contempts, like the prosecution of other federal crimes, normally is undertaken by the Department of Justice. In this case, however, the district court, acting prior to this Court's decision in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, No. 85-1329 (May 26, 1987), appointed a private attorney to assist it in connection with charges of criminal contempt by presenting the evidence of those charges to the court. In *Young*, this Court held that although a federal district court possesses the power to appoint a private attorney to "prosecute" a charge of criminal contempt in this manner, "a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied" (*Young*, slip op. 13). For reasons that we regard as insufficient, the district court did not follow that procedure in this case.[1] As a result, contempt charges were presented below, and are being pursued before this Court,

[1] The district court chose not to ask a representative of the Department of Justice to undertake the prosecution because the Federal Bureau of Investigation and the Department of Justice were defend-

in the name of the United States but not by the Department of Justice. The government has an interest in the disposition of the issues presented in this case, because the Court's decision will affect those criminal contempt cases—which constitute the vast majority—that are prosecuted by the Department of Justice.[2]

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ants in the underlying civil action from which the contempt charge arose (Pet. App. A5). However, the United States is a party to many civil and criminal cases from which contempt proceedings arise, and the United States commonly has an interest in the underlying proceeding that is either consistent with or contrary to the interest of the party who is charged with contempt. That fact alone does not disqualify a government attorney from pursuing criminal contempt charges referred by the district court. In this case, the charge of contempt involved the conduct of the Journal, not that of the FBI or the Department of Justice, and it was brought solely to vindicate the authority of the district court, not to advance the private interests of the plaintiff (or the governmental interests of the FBI or the Department of Justice) in the civil action. There is no reason to believe that under these circumstances a government attorney would have encountered a conflict of interest, or otherwise would have found his independent judgment compromised, in prosecuting the contempt charge against respondents.

Moreover, this case is not like *Young*, in which the private attorney appointed to prosecute the criminal contempt on behalf of the public had a private client who might have conflicting interests. In that situation, the policies underlying a criminal conflict-of-interest statute (18 U.S.C. 208(a)), as well as ethical standards, barred the dual representation. In this case, by contrast, the government attorney would have a *single* client—the United States—in the underlying civil action and the criminal contempt prosecution, and there would be no statutory or regulatory prohibition against his representing that single client in the two separate proceedings.

[2] Under 28 U.S.C. 518(a), unless the Attorney General otherwise directs, the Solicitor General must conduct and argue all cases in this Court "in which the United States is interested." In light of the decision in *Young*, we believe that this provision is best read as referring to cases in which the United States is "interested" by virtue of the constitutional and statutory responsibilities of the Executive Branch. Where, as in *Young* and the instant case, a contempt is punished in proceedings that are wholly internal to the Judicial Branch as an ancillary aspect of its powers under Article III (see *Young*, slip op. 7-12)—rather than by a prosecution initiated by the Executive Branch in accordance with its responsibilities under Article II and 28 U.S.C. 547—proceedings in this Court arising out of the contempt citation would fall outside the scope of Section 518(a). For that reason, we do not believe that the authorization of the Solicitor General is required in order for the specially appointed private attorney to seek review in this Court on the district court's behalf.

STATEMENT

1. From 1962 to 1965, the Federal Bureau of Investigation conducted electronic surveillance of the home of Raymond L. S. Patriarca in Providence, Rhode Island. Patriarca was reputed to be a senior member of a New England organized crime "family," and the surveillance was carried out as part of an investigation into organized crime in the area. The surveillance, conducted prior to the enactment of the federal wiretapping statute, 18 U.S.C. 2510 *et seq.*, was not performed pursuant to judicial authorization and therefore violated the Fourth Amendment. See *Providence Journal Co.* v. *FBI*, 602 F.2d 1010, 1013 (1st Cir. 1979), cert. denied, 444 U.S. 1071 (1980).

The FBI eventually destroyed the tape recordings produced by the surveillance of the Patriarca home, but it retained written logs and memoranda compiled from the recordings. In November 1976, the Journal sought disclosure of the logs and memoranda pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552. The FBI declined to release the materials on the ground that they fell within FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), which permits the withholding of information compiled for law enforcement purposes if disclosure would constitute "an unwarranted invasion of personal privacy."

The Journal brought suit against the FBI to compel disclosure of the materials. On appeal from the district court's decision, which required disclosure of limited portions of the materials, the First Circuit ruled that the FBI was acting within its discretion under Exemption 7(C) in

refusing the Journal's request in its entirety. *Providence Journal Co.* v. *FBI, supra.*

2. In 1984, Raymond Patriarca died. Shortly thereafter, the Journal renewed its request for the logs and memoranda. This time, the FBI released the materials to the Journal. The FBI made the same materials available to other members of the news media, including WJAR (a Providence television station) and the Hartford *Courant* (a Connecticut newspaper). Pet. App. A29. The Hartford *Courant* published an article based on some information derived from the FBI logs and memoranda on September 22, 1985 (J.A. 35, 101-113, 141-143).[3]

On November 8, 1985, Raymond Patriarca's son, whose conversations with his father had been among those monitored by the FBI, filed suit in the United States District Court for the District of Rhode Island to prevent the Journal and WJAR from disclosing the contents of the FBI materials. In addition, Patriarca's son sought damages and declaratory relief from the FBI and the Department of Justice for releasing the materials. The complaint was based on the FOIA, the federal wiretapping statute, and the Fourth Amendment. At the same time, Patriarca's son filed a motion for a temporary restraining order or a preliminary injunction barring further disclosure of the FBI materials during the pendency of the case. J.A. 206, 217-218.

[3] In addition, plaintiff alleged (J.A. 209) and the Journal's November 14 article reported (*id.* at 10) that WJAR had broadcast a news story on November 6 based on information it had obtained from the FBI. The record does not suggest that the actions of the Hartford *Courant* and WJAR disclosed all of the relevant information from the voluminous FBI materials, and there is no indication that respondents urged the district court to deny or terminate the restraining order on the ground that the relevant information was already in the public domain. See *id.* at 58-88, 142-143.

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On the afternoon of November 13, 1985, the district court held a conference regarding the application for a temporary restraining order (J.A. 175-176). Over the objections of the Journal's attorney, who argued that any restraining order would violate the First Amendment, the district court granted the application.[4] The district court originally expressed its intention to hear arguments on plaintiff's request for a preliminary injunction on November 14, the following day (*id.* at 34). However, the Journal's attorney advised the district court that the Journal would need more time to prepare adequately for the hearing (*id.* at 167). The district court therefore entered an order temporarily restraining the Journal and WJAR from disclosing the contents of the logs and memoranda, insofar as they related to Patriarca's son, pending a hearing at 10 a.m. on November 15, less than 48 hours later (*id.* at 6-7). Pet. App. A3-A4, A18.

The Journal's counsel informed the Journal's management of the temporary restraining order later in the afternoon of November 13 (J.A. 34). Nevertheless, over the course of the evening of November 13, the Journal's management decided to publish an article based on the logs and memoranda the following morning (*id.* at 121-123, 138-139). The Journal published one article on what it called "the Patriarca tapes" in its morning edition on November 14 and published the same article again in the afternoon edition (*id.* at 34). The Journal's management was aware at all relevant times that publishing the article on November 14 would violate the district court's temporary restraining order (*ibid.*). The Journal's executive editor, respondent Hauser, subsequently testified that the decision to publish was based in part on the belief that the restraining order was an unconstitutional prior restraint and in part on the belief that complying with the

[4] The government also opposed the temporary restraining order (Pet. App. A29).

order "would be a clear signal to people that frequently like[] to block publication of something" (*id.* at 122-124).

At the scheduled November 15 hearing, the district court extended the restraining order for four days (J.A. 64-65, 71). Then, on November 19, the court vacated the order and denied the plaintiff's motion for a preliminary injunction (*id.* at 85). The Journal apparently did not publish any additional articles based on the information after the restraining order was vacated (Pet. App. A24).

3. On November 14, the day on which the Journal published its article, Patriarca's son moved to have the Journal and Hauser held in criminal contempt (J.A. 223). Following a show-cause order and a hearing, the district court found the Journal and Hauser guilty of criminal contempt (Pet. App. A1-A22). The court explained that the purpose of the restraining order "was to hold matters in *status quo* pending a brief interlude for research and contemplation" (*id.* at A13). That interlude was necessary, the court explained, because even the Journal had not called the court's attention to any relevant precedent concerning the court's jurisdiction prior to its decision to publish (*id.* at A12); instead, the court noted, the Journal had requested an extra day to prepare for the hearing on the preliminary injunction (*id.* at A10-A11). In these circumstances, the court concluded, the Journal had no right to "seize[] the judicial power to itself" by defying the order (*id.* at A22). The district court fined the Journal $100,000 and ordered Hauser to perform 200 hours of community service (*id.* at A23-A26).

On appeal, a panel of the First Circuit overturned the convictions (Pet. App. A27-A46) because, in its view, the November 13 temporary restraining order on which the contempt was predicated was "transparently invalid" under the First Amendment (*id.* at A45). The panel recognized that "[a]s a general rule, a party may not violate an order and raise the issue of its constitutionality

collaterally as a defense in the criminal contempt proceeding" (*id.* at A32). The panel concluded, however, that an exception to this general rule is required when a "transparently invalid" injunction is involved (*id.* at A33). The panel determined that none of the grounds put forward in support of the temporary restraining order—the FOIA, the federal wiretapping statute, or the Fourth Amendment—provided even a colorable basis for the order, particularly in light of the First Amendment's heavy presumption against prior restraints (*id.* at A38-A41).

The court of appeals, sitting en banc, subsequently modified the panel's opinion, but it left in place the panel's order reversing the contempt convictions (Pet. App. A47-A49). The en banc court held that even when a "transparently invalid" order is involved, the party subject to the order must "make a good faith effort to seek emergency relief from the appellate court" before disobeying the order (*id.* at A48). Although respondents had made no such effort, the en banc court nonetheless declined to reinstate the contempt convictions. The court found itself "without a clear conviction" that timely emergency relief could have been obtained before the Journal had to make its final editorial decision about the contents of its November 14 editions. The court also regarded it as unfair to subject the Journal to criminal sanctions because it had failed to follow a procedure that the court of appeals had not previously announced. *Id.* at A49.

SUMMARY OF ARGUMENT

I. This case involves a contempt based on the violation of an order of a federal court. The offense in this case is defined by 18 U.S.C. 401(3), which makes it a crime to engage in "[d]isobedience or resistance" to a federal court's "lawful writ, process, order, rule, decree, or command." This Court's decisions make clear that an order is not "lawful" for purposes of criminal contempt if it is beyond the jurisdiction of the issuing court. At the same time,

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however, an order does not cease to be "lawful" merely because it is erroneous. As long as the order is within the court's jurisdiction, the fact that the order may later be held to be erroneous does not entitle a person subject to the order to disregard it with impunity. Moreover, even if a federal court ultimately lacks jurisdiction over the subject matter of a case or the authority to grant the requested relief, the court possesses jurisdiction to determine its jurisdiction at the outset. As a result, an order designed to preserve the status quo temporarily while the court reviews the substance of the dispute is a "lawful" order within the meaning of Section 401(3), and a violation of that order will support a conviction for criminal contempt.

The court of appeals held that respondents were excused from their refusal to comply with the temporary restraining order because that order was "transparently invalid." In our view, however, as long as an order is within the jurisdiction of the issuing court, Section 401(3) does not distinguish between "transparently" invalid orders and "merely" invalid orders; nor do we see any way in which such a distinction can be given meaningful content. The correctness of an order is relevant to liability under Section 401(3) only if the order is invalid because the underlying claim is too insubstantial even to vest the court with federal-question jurisdiction.

II. Even if the court of appeals is correct in holding that a party may in some circumstances justifiably refuse to comply with an order that is manifestly unconstitutional, respondents were not justified in refusing to comply with the order in this case, because they did not seek to obtain review of the order before violating it. This Court has held that when a party believes that a court's order violates his constitutional rights, he must seek review of that order, rather than simply defy it.

Respondents did not seek reconsideration from the district court or emergency relief from the court of appeals based on any asserted urgency of the matter. To the contrary, while the district court was prepared to address the question of the propriety of injunctive relief within 24 hours, respondents sought additional time to brief that issue. Then, rather than seeking to obtain appellate review of the order, respondents set out to flout that order on the ground that they believed it to be improper. Respondents' failure to seek immediate review of the disputed order—or to show by their effort to do so that prompt review was unavailable—should foreclose them from arguing that they were entitled to disregard the district court's order and to proceed as they saw fit.

ARGUMENT

I. REFUSAL TO COMPLY WITH AN ORDER OF A FEDERAL COURT CONSTITUTES CRIMINAL CONTEMPT IN VIOLATION OF 18 U.S.C. 401(3) UNLESS THE ORDER EXCEEDS THE JURISDICTION OF THE COURT

1. The power of the federal courts to impose criminal sanctions for disobedience of their orders was first codified in the Judiciary Act of 1789. Section 17 of the Judiciary Act, ch. 20, 1 Stat. 83, provided that the courts of the United States "shall have power * * * to punish by fine or imprisonment * * * all contempts of authority in any cause or hearing before the same [courts]." The Judiciary Act did not attempt to define "contempts of authority," leaving it to the federal courts to determine what conduct would be deemed contemptuous. See Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers,* 37 Harv. L. Rev. 1010, 1024 (1924); see also *In re Savin,* 131 U.S. 267, 275-276 (1889).

In 1831, concern over abuses of this open-ended power led Congress to enact a new contempt statute that for the first time defined the types of conduct that could be treated as criminal contempts. The 1831 Act, while pur-

porting to be merely "declaratory" of existing law, provided:

> [T]he power of the several courts of the United States to * * * inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, * * * the misbehaviour of any of the officers of the said courts in their official transactions, and *the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.*

Act of Mar. 2, 1831, ch. 99, § 1, 4 Stat. 487-488 (emphasis added). See *Bloom* v. *Illinois*, 391 U.S. 194, 202-203 (1968); *United States* v. *Barnett*, 376 U.S. 681, 687 (1964); *Nye* v. *United States*, 313 U.S. 33, 45-48 (1941).[5]

The 1831 Act survives today, in substantially its original form, as Section 401 of Title 18. See *Bloom*, 391 U.S. at 203-204. The final clause of Section 1 of the 1831 Act, imposing criminal contempt for disobedience or resistance to lawful orders of the courts, is currently codified in Section 401(3). Section 401(3) provides that a court of the United States shall have the power to punish, by fine or imprisonment, "[d]isobedience or resistance to [the court's] lawful writ, process, order, rule, decree, or command." It is

[5] The 1831 legislation was prompted by the action of District Judge Peck, who jailed and disbarred an attorney for publicly criticizing one of the judge's rulings. That episode culminated in Judge Peck's impeachment by the House of Representatives, although he was acquitted in the Senate. See *Bloom*, 391 U.S. at 203; *Nye*, 313 U.S. at 45-48; Frankfurter & Landis, *supra*, 37 Harv. L. Rev. at 1024-1027; Nelles & King, *Contempt by Publication in the United States*, 28 Colum. L. Rev. 401, 423-430 (1928).

therefore Section 401(3) that governs the liability of respondents in this case.[6]

2. Section 401(3), like its 1831 predecessor, confines criminal contempt to violations of "lawful" judicial orders. It seems clear that Congress deliberately sought to distinguish "lawful" orders, whose violation constitutes a prima facie case of criminal contempt, from "unlawful" orders, whose violation does not. The line dividing the two categories is demonstrated by this Court's precedents.

It has long been settled that a person may not be held in criminal contempt for violation of an order that exceeds the jurisdiction of the issuing court. See, *e.g.*, *United States* v. *United Mine Workers*, 330 U.S. 258, 291 (1947); *In re Sawyer*, 124 U.S. 200, 221-222 (1888); *Ex parte Fisk*, 113 U.S. 713, 718 (1885); *Ex parte Rowland*, 104 U.S. 604, 612 (1881); *United States* v. *Thompson*, 319 F.2d 665, 668 (2d Cir. 1963); *Heasley* v. *United States*, 312 F.2d 641, 649 (8th Cir. 1963). Thus, if a district court lacks subject matter jurisdiction over a controversy, violation of an injunction in favor of the plaintiff does not give rise to criminal contempt (see, *e.g.*, *United Mine Workers*, 330 U.S. at 294; *Ex parte Rowland*, 104 U.S. at 612; cf. *In re Green*, 369 U.S. 689, 692 (1962)), at least if the question of the

[6] We do not understand this Court's recent decision in *Young* to suggest that litigants may be subjected to criminal liability for violation of orders in circumstances that are not covered by 18 U.S.C. 401. The Court noted in *Young* that federal courts have long been held to "possess inherent authority to initiate contempt proceedings for disobedience to their orders" (slip op. 5). The Court also noted, however, that the contempt power is subject to regulation by Congress, as long as that regulation does not " 'abrogate[ ] nor render practically inoperative' " the courts' exercise of that power (slip op. 11, quoting *Michaelson* v. *United States ex rel. Chicago, S.P., M & O. Ry.*, 226 U.S. 42, 66 (1924)). The 1831 statute and its successors have been upheld as a valid form of regulation of the contempt power. See *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510-511 (1873) (preexisting authority of inferior federal courts over the subject matter of criminal contempts was validly limited by the 1831 Act).

court's subject matter jurisdiction was not actually litigated in connection with the issuance of the injunction. See *United Mine Workers*, 330 U.S. at 292 n.57; cf. *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938); Restatement (Second) of Judgments § 12 comment c (1982).

It is equally clear that an order that is within the jurisdiction of the issuing court is not "unlawful" simply because it is erroneous. This Court and other federal courts have consistently held that such orders must be obeyed until they are set aside on appeal; they therefore may give rise to a conviction for criminal contempt for a violation that occurred while they were in effect. See, *e.g.*, *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U.S. 375, 386 (1980); *United Mine Workers*, 330 U.S. at 293; *Walker* v. *City of Birmingham*, 388 U.S. 307, 314 & n.5 (1967) (discussing federal precedents); *In re Sawyer*, 124 U.S. at 220 (quoting *Elliott* v. *Peirsol*, 26 U.S. (1 Pet.) 328, 340 (1828)); *Worden* v. *Searls*, 121 U.S. 14, 27 (1887); *Dolman* v. *United States*, 439 U.S. 1395 (1978) (Rehnquist, J., Circuit Justice); *United States* v. *Lowery*, 733 F.2d 441, 445-446 (7th Cir.), cert. denied, 469 U.S. 932 (1984); *Pennsylvania* v. *Local Union 542*, 552 F.2d 498, 505-506 (3d Cir.), cert. denied, 434 U.S. 822 (1977).[7]

This principle that a court's decision is "to be respected" unless "reversed for error by orderly review either by itself or by a higher court" (*Howat* v. *Kansas*, 258 U.S. 181, 190 (1922)) "has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments, and orders necessary to the due administration of law, and the protection of the rights of

[7] See also *Sheet Metal Workers Local 28* v. *EEOC*, No. 84-1656 (July 2, 1986), slip op 16 n.21 (quoting *Maggio* v. *Zeitz*, 333 U.S. 56, 69 (1948) ("a 'contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy' ")).

suitors" (*Ex parte Fisk*, 113 U.S. at 718). By contrast, " '[i]f a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls "the judicial power of the United States" would be a mere mockery' " (*Young*, slip op. 8, quoting *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)). Such an approach also would invite disrespect for the law. Accordingly, " '[t]he procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience.' " *United States* v. *Rylander*, 460 U.S. 752, 756-757 (1983) (quoting *Maggio* v. *Zeitz*, 333 U.S. 56, 69 (1948)).

In light of these well-settled principles, it appears that when Congress enacted the predecessor to 18 U.S.C. 401(3), it sought to codify the distinction between orders that are wholly beyond the jurisdiction of the issuing court and orders that, even if erroneous, are within the court's jurisdiction (and therefore not subject to readjudication in a contempt proceeding). By its terms, Section 401(3)—like its predecessors—requires not that the underlying order be "correct," but only that it be "lawful." An order that is erroneous but nonetheless within the power of the court to issue would not normally be thought of as unlawful. Although Congress undoubtedly sought to cabin the authority of federal courts to punish contempts when it enacted the predecessor to Section 401 in 1831, there is no indication that it meant to make *every* judicial order subject to collateral attack in subsequent criminal contempt proceedings.[8]

[8] The contemporaneous understanding of the scope of habeas corpus jurisdiction supports the view that when Congress referred to "lawful" orders in the 1831 statute, it meant orders that are within the jurisdiction of the court to issue. One year earlier, in a decision construing the first federal habeas corpus statute, the Court referred to

3. An additional consideration arises where, as here, the order that allegedly was violated was issued on a temporary basis to maintain the status quo pending a more thorough assessment of the underlying controversy. Compare *Walker* v. *City of Brimingham,* 388 U.S. at 333-334 (Warren, C.J., dissenting). Federal courts have jurisdiction to determine their jurisdiction. 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3536 (2d ed. 1984). An order designed to protect this limited form of jurisdiction by temporarily preserving the status quo is within a federal court's power,[9] even if it is subsequently determined that the court lacks subject matter jurisdiction over the claim. Accordingly, such an interim order is within the jurisdiction of the issuing court and therefore "lawful" for purposes of 18 U.S.C. 401(3), and a violation of the order is subject to criminal sanctions under that statute.

Two decisions by this Court illustrate this principle. *United States* v. *Shipp,* 203 U.S. 563 (1906), involved criminal contempt proceedings initiated by the Attorney General in this Court against state officials who had violated a stay of execution issued by the Court in an appeal from a decision rendered by a circuit court in a habeas corpus proceeding. The contemnors defended on the ground that the Court lacked subject matter jurisdiction over the appeal and that they therefore were not criminally liable for violating the stay order. The Court rejected that argument, holding that even if the Court ultimately lacked

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the concept of a lawful order in precisely that way. *Ex parte Watkins,* 28 U.S. (3 Pet.) 193, 203 (1830) ("An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous.")

[9] See 28 U.S.C. 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

subject matter jurisdiction, the stay order was within the Court's inherent power to preserve the status quo while determining its jurisdiction and therefore supported criminal contempt (*id.* at 573):

> [E]ven if the Circuit Court had no jurisdiction to entertain [the habeas] petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. On that question, at least, it was its duty to permit argument and to take the time required for such consideration as it might need. * * * Until its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition * * * .

The Court reached the same conclusion in *United States* v. *United Mine Workers, supra.* At issue in *United Mine Workers* was a criminal contempt charge based on violations of a temporary restraining order prohibiting a coal strike. The Court ruled that even if it ultimately were held that the Norris-La Guardia Act divested the district court of authority to enjoin the strike, the district court "had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief" (330 U.S. at 293). Accordingly, "[t]he defendants * * * acted at their peril" in violating the restraining order and "[t]heir disobedience is punishable as criminal contempt" (*ibid.*; see *id.* at 310-311 (Frankfurter, J., concurring in the judgment) ("[I]f the district court had power to decide whether this case was properly before it, it could make appropriate orders so as to afford the necessary time for fair consideration and decision while existing conditions were preserved.")). *United Mine Workers* "stands for the proposition that a trial court can issue a temporary restraining order to maintain the status quo while it is determining its

authority to act further in the case." C. Wright, A. Miller & E. Cooper, *supra*, § 3537, at 543 (footnote omitted). The case also stands for the equally important proposition that violation of such an order constitutes criminal contempt.[10]

4. The court of appeals suggested that disobedience of a federal court order does not constitute criminal contempt if the order is "transparently invalid." The court did not indicate specifically how orders that are "transparently" invalid are to be distinguished from orders that are "merely" invalid. Neither did the court attempt to connect the notion of a "transparently invalid" order to the language or policies of Section 401(3), a statute that the court of appeals appears to have overlooked. We submit that the concept of a "transparently invalid" order is relevant only in a limited fashion under Section 401(3), and then only as a way of expressing the principle that criminal contempt cannot rest on orders that are beyond the jurisdiction of the issuing court.[11]

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[10] The Court noted in *United Mine Workers* that a different result might follow "were the question of jurisdiction frivolous and not substantial" (330 U.S. at 293). Justice Frankfurter, who provided the necessary fifth vote in favor of sustaining the district court's injunction, explained that this exception would apply only where the district court's jurisdictional authority "ha[d] unquestionably been withheld" by Congress (*id.* at 310 (Frankfurter, J., concurring in the judgment)). Accord *In re Green*, 369 U.S. at 693 (Harlan, J., concurring in part and dissenting in part) (disobedience of a temporary restraining order may be punished as criminal contempt where the court's "claim to jurisdiction over the underlying proceeding is not frivolous"); *GTE Sylvania*, 445 U.S. at 386 (quoting *Walker* v. *City of Birmingham*, 388 U.S. at 315 (" 'only a frivolous pretense to validity' ")). Compare *Stump* v. *Sparkman*, 435 U.S. 349, 357-360 (1978). In this case, even if the district court ultimately lacked authority to grant relief, the question of its jurisdiction cannot be dismissed as "frivolous," nor was its jurisdiction "unquestionably • • • withheld" by Congress.

[11] As the court of appeals noted, this Court's opinion in *Walker* states that "this is not a case where the injunction [underlying the contempt conviction] was transparently invalid • • •" (388 U.S. at 315). It is unclear from the Court's opinion what significance, if any, the Court meant to attach to that fact. The Court presumably did not mean to deny that the injunction was an unconstitutional prior restraint, for the Court at the same time acknowledged that both the injunction and the permit ordinance on which it was based presented "substantial constitutional question[s]" (*id.* at 316-317), and the Court unanimously struck down the ordinance as an unconstitutional prior restraint two Terms later in *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969). Thus, the reference to "transparent invalidity" in *Walker* must be read as referring to an injunction that is not merely unconstitutional, or even plainly unconstitutional, but so utterly without basis that the issuing court is acting as "a pretender to, not a wielder of, judicial power" (*United Mine Workers*, 330 U.S. at 310 (Frankfurter, J., concurring in the judgment)). Whatever its failings, the injunction in this case was not such an order; it was no more "transparently invalid" than the injunction in *Walker* itself.

If a plaintiff's claim is utterly baseless as a matter of federal law, an injunctive order predicated on the claim would not be "lawful" for purposes of Section 401(3)—not because the order is invalid in some abstract sense, "transparently" or otherwise, but simply because it rests on a claim that is so insubstantial as to deprive the court of subject matter jurisdiction.[12] Even in that situation, as *United Mine Workers* and *Shipp* demonstrate, preliminary injunctive orders designed to preserve the status quo pending determination of the jurisdictional question remain "lawful" for purposes of criminal contempt. Indeed, the specific jurisdictional objection raised by the contemnors in *Shipp* was that "the case did not involve the application of the Constitution, otherwise than by way of pretense"—in short, an argument that the case did not present a substantial federal question. See 203 U.S. at 572.

[12] A complaint that states a federal claim on its face may nonetheless fall outside the reach of federal question jurisdiction, but such cases are rare: prior decisions must render the claim inescapably frivolous (*Goosby* v. *Osser*, 409 U.S. 512, 518 (1973)), or the claim must be so insubstantial as to be clearly without merit. *Hagans* v. *Levine*, 415 U.S. 528, 536 (1974).

In applying its test of "transparent invalidity" in this case, the court of appeals simply analyzed each of the three causes of action pleaded in the complaint and concluded that none of them would justify injunctive relief against the Journal (Pet. App. A38-A40). That approach, however, ignores the fact that the district court was granting only a two-day temporary restraining order, not permanent or even preliminary injunctive relief. See *id.* at A12, A18-A19; J.A. 61. The district court did not have the leisure that the court of appeals had to determine whether any of the claims in the complaint could conceivably support a request for an injunction. Nonetheless, the complaint clearly invoked the district court's subject matter jurisdiction, and the Journal was clearly subject to the court's personal jurisdiction. The court therefore had jurisdiction to enter an order staying the publication of the materials pending a hearing two days later. For this reason, the order was "lawful" within the meaning of 18 U.S.C. 401(3), and the district court properly held respondents in contempt for deliberately violating it.

Nor is this a case in which Congress or the Constitution has announced any absolute bar to injunctive relief. Although there is a heavy presumption against prior restraints of any type, this Court has never held that prior restraints are absolutely prohibited. See *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1975) ("Prior restraints are not unconstitutional *per se*."). Moreover, this Court has never held that a federal court may not ever exercise its authority to maintain the status quo pending a determination whether a prior restraint is appropriate in a particular case. To the contrary, this Court itself entered such orders in *New York Times Co.* v. *United States*, 403 U.S. 942 (1971), and *United States* v. *Washington Post Co.*, 403 U.S. 943 (1971). See also *Morland* v. *Sprecher*, 443 U.S. 709 (1979). The power of a district court to do so is supported not only by the statutory authority that federal courts have enjoyed since 1789 to issue writs in aid

of their jurisdiction (see 28 U.S.C. 1651(a); Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82), but also by the courts' general equitable jurisdiction, the "comprehensiveness of [which] is not to be denied or limited in the absence of a clear and valid legislative command." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946). See also *Amoco Production Co.* v. *Village of Gambell*, No. 85-1239 (Mar. 24, 1987), slip op. 9-10; *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944).

II. AT LEAST IN THE ABSENCE OF EFFORTS TO HAVE THE TEMPORARY RESTRAINING ORDER SET ASIDE, RESPONDENTS CANNOT DEFEND AGAINST CHARGES OF CRIMINAL CONTEMPT ON THE GROUND THAT THE ORDER WAS "TRANSPARENTLY INVALID"

The panel below acknowledged the general rule, established by this Court's cases and embodied in 18 U.S.C. 401(3), that an order that is within the jurisdiction of the issuing court must be obeyed unless and until it is set aside on further review, and that a person who violates the order while it remains in effect is subject to punishment for criminal contempt. See Pet. App. A32-A34. The panel nevertheless fashioned an exception to that rule for situations in which the order is collaterally attacked in the contempt proceedings on First Amendment grounds and the order is found in those proceedings to have been "transparently invalid" (*id.* at A34-A38). On rehearing en banc, the full court of appeals concluded that even where the party believes that the order is transparently invalid, he cannot raise that defense in the contempt proceedings unless he made a good faith effort to seek emergency relief from an appellate court.

We agree with the en banc court of appeals that even where a party believes that an injunctive order affecting First Amendment rights is erroneous, he cannot simply take the law into his own hands and defy the order with impunity. A proper respect for the judicial process and the

compelling governmental interest in ensuring compliance with judicial orders require that the party make a good faith effort to have the order set aside on direct review by the issuing court and appellate courts, rather than attack that order collaterally in subsequent contempt proceedings. In this case, there is no basis for believing that prompt relief was foreclosed, because the federal judicial system is structured to accommodate expedited proceedings. Since respondents concededly made no effort to seek relief from the temporary restraining order before they deliberately violated it (J.A. 36), respondents' contempt convictions should be reinstated—even if we assume that a party who did seek relief might be excused from complying with a manifestly unconstitutional order if relief proved to be unavailable.

1. This Court's decisions make clear that the general principle that a party cannot "make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside" (*Gompers*, 221 U.S. at 450), applies in full force to orders that are alleged to be invalid on constitutional grounds. Thus, in *Walker* v. *City of Birmingham*, where an injunction (prohibiting parades and demonstrations) was challenged on First Amendment grounds, the Court held (388 U.S. at 314 (quoting *Howat* v. *Kansas*, 258 U.S. at 189-190)):

> An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its

> orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.

Consistent with this principle, the Court in *Walker* rejected the contention "that the Constitution compelled Alabama to allow the petitioners to violate this injunction * * * without any previous effort on their part to have the injunction dissolved or modified, or any attempt to secure a parade permit in accordance with its terms" (388 U.S. at 315).

The Court expressed a similar view in *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980), which involved a First Amendment challenge to a state statute that authorized a court to issue an order imposing a prior restraint of indefinite duration on the exhibition of films that had not been finally determined to be obscene. The Court held that the particular statutory scheme violated the First Amendment because it did not contain adequate procedural safeguards to assure that the merits were promptly resolved and that the prior restraint pendente lite was correspondingly limited (445 U.S. at 315-316). But the Court stated that where a court does temporarily bar exhibition of a film under such a scheme, "[p]resumably, an exhibitor would be required to obey such an order pending review of its merits and would be subject to contempt proceedings even if the film is ultimately found to be nonobscene" (445 U.S. at 316 & n.15, citing *Walker* and *United Mine Workers*). See also *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968) (the parties followed the "proper procedure" under *Walker* by seeking review of an injunction that barred demonstrations and complying with the injunction pending review); *National Socialist Party* v. *Village of Skokie*, 432 U.S. 43, 44 (1977); *Morland* v. *Sprecher*, 443 U.S. at

709-710; cf. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 439 (1976).[13]

2. Although the Court in *Walker* adhered to the established rule that a party must obey even an allegedly unconstitutional order until it is set aside, the Court did state that "[the] case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims" (388 U.S. at 318). But the Court observed that there was no indication that the petitioners' claims would have encountered such a reception in the state courts and that, in any event, the petitioners "g[a]ve absolutely no explanation of why they did not make some application to the state court" to modify the injunction during the two-day period between its issuance and the scheduled date of one the marches (*id.* at 318-319). The

[13] Different procedures have been developed in the case of the assertion of a claim of privilege during a criminal trial or grand jury proceeding. Rather than allowing an immediate appeal from a judicial order rejecting the claim, which might disrupt the proceeding, the Court has construed the applicable statutory provisions to foreclose such an appeal and instead to allow a challenge to the order to be raised as a defense in a contempt proceeding, if the subject of the order chooses to resist compliance. See, *e.g.*, *United States* v. *Ryan*, 402 U.S. 530, 532-533 (1971); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); see also *Maness* v. *Meyers*, 419 U.S. 449, 460-461 (1975). These cases demonstrate that a legislature may provide different ways to challenge the validity of a judicial order. The *Walker* case makes clear that there is no constitutional bar to a scheme that requires, in the case of prohibitory injunctions, that a challenge to the injunction be made, if at all, by a motion to the issuing court to modify the order or on direct appeal of the order, rather than by collateral attack in the ensuing contempt proceeding. In *Ryan*, the Court confirmed that its "holding [in *Walker*] that the [constitutional] claims * * * sought to be asserted were not open on review of petitioners' contempt convictions was based on the availability of review of those claims at an earlier stage" (402 U.S. at 532 n.4).

Court explained that the injunction had been entered ex parte and that the trial court therefore might have modified or dissolved it if the petitioners had presented that court with their arguments concerning the breadth and vagueness of the injunction and the municipal ordinance it was intended to enforce, as well as their claims of discriminatory enforcement (*ibid.*). The court further explained that if the trial court had denied relief, "Alabama procedure would have provided for an expedited process of appellate review"; and it "[could not] be presumed that the Alabama courts would have ignored the petitioners' constitutional claims," since similar contentions were accepted by an Alabama appellate court in another case (*id.* at 319 (footnote omitted)).

Walker thus teaches, as a corollary to the principle that a judicial order must be obeyed until it is set aside, that where there are facially valid procedures for seeking review of a restraining order, a party who is subject to that order cannot collaterally attack its constitutionality in subsequent contempt proceedings unless, at a minimum, he first sought to invoke those procedures and was denied a meaningful opportunity for relief.

3. In this case, as in *Walker*, applicable rules and procedures in the federal judicial system afforded respondents several avenues for seeking relief from the restraint that the district court imposed on the Journal's publication of the information it had obtained from the FBI.

a. As an initial matter, respondents could have sought relief from the district court. Preliminary orders in civil litigation often are entered before the court has had a full opportunity to review the substance of the parties' contentions. In particular, temporary restraining orders often are entered solely to preserve the status quo, with only limited attention to the merits of the parties' underlying claims. See, *e.g.*, *Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters Local 70*, 415 U.S. 423, 441-444 (1974). For that reason, a litigant who has substantial legal and equitable objections to a temporary restraining order will

often be able to obtain relief from the issuing court, which might either vacate the restraining order or decline to enter a preliminary injunction when the restraining order expires at the end of the 10-day period specified by Fed. R. Civ. P. 65(b) or the lesser period specified by the issuing court.

In this case, there was no reason for respondents to forgo the opportunity to obtain relief from the district court. That court indicated in its opinion holding respondents in contempt that prior to publication of the article on November 14, 1985, the Journal had not called to the court's attention any authority relevant to the question of the court's jurisdiction to bar publication (Pet. App. A12-A13), and the court was not even informed of the precise nature of the material that the plaintiff sought to have withheld from the public when it entered the temporary restraining order (*id.* at A17; J.A. 60).

Moreover, by proposing to set a hearing for the day after it entered the restraining order, the district court manifested its intention to resolve immediately the question of continuing the restraint. See J.A. 73.[14] But rather than take advantage of that opportunity for an especially expeditious resolution, the Journal's attorney informed

[14] Respondents thus were not confronted in the trial court with a procedural system that provided for an injunction pendente lite of indefinite duration, which was the defect the Court found in the provision for judicial imposition of prior restraints in *Vance* v. *Universal Amusement Co., supra*. See 445 U.S. at 316-317. Nor does the federal system permit the sort of ex parte prior restraints that were found to violate the First Amendment in *Carroll*, 393 U.S. at 180-185. Rule 65(b), Fed. R. Civ. P., provides that a temporary restraining order may not be issued without notice to the opposing party, unless it clearly appears that irreparable injury will result and the applicant's attorney details the efforts that have been made to give notice and the reasons why notice should not be required. In any event, the order in this case was not issued ex parte, and counsel for the Journal in fact opposed it on the ground that any prior restraint would violate the First Amendment (Pet. App. A29; J.A. 166, 169, 170-173).

the court that he could not be prepared for a hearing the next day, and for that reason the court postponed the hearing—and extended the restraining order—for an additional day (Pet. App. A3, A18). Respondents therefore are in no position to argue that the district court would not have given expeditious consideration to their objections to an order that they now claim was "transparently invalid." Compare *Morland* v. *Sprecher*, 443 U.S. at 709-710. Nor did respondents take other steps, such as asking the district court to expedite the hearing, when they decided to violate the restraining order before the scheduled date of the hearing on November 15. Respondents also failed to notify the district court and the other parties, even though the request by the Journal's attorney for additional time presumably left the district court and the other parties with the impression that the Journal intended to respect the restraining order while it remained in effect.

Finally, when the district court did rule on the plaintiffs' request for a preliminary injunction—on November 19, 1985, which was only six days after the restraining order was issued—the court denied that request in light of respondents' constitutional arguments (J.A. 73-85). Thus, if respondents had followed orderly procedures in the district court, it is highly likely that the matter would have been resolved promptly, and in a manner favorable to respondents.

b. Aside from the possibility that the district court would have granted relief, respondents could have sought appellate review of the restraining order. The panel noted that "the Journal arguably had avenues of appellate relief immediately available to it" (Pet. App. A44 (footnote omitted)). For example, the panel observed that under First Circuit precedent, the district court's order, although labeled a temporary restraining order, might have been immediately appealable as of right under 28 U.S.C. 1292(a)(1) on the ground that it was essentially the equivalent of an injunction. See Pet. App. A44 & n.70,

citing *Societe Generale de Surveillance* v. *Ratheon European Management & Systems Co.*, 643 F.2d 863, 864-865 n.2 (1st Cir. 1981).[15] Furthermore, if the restraining order was as far beyond the scope of the district court's authority as respondents maintain, the court of appeals presumably could have granted mandamus relief under 28 U.S.C. 1651 and Fed. R. App. P. 21(a). See *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976) (quoting *Will* v. *United States*, 389 U.S. 90, 95 (1967) (" 'exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy' ")); see also *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, No. 85-1695 (June 15, 1987), slip op. 4-5.

It also is clear that procedures were available by which respondents could have sought expedited appellate review. The courts of appeals, like all courts of the United States, are "deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." 28 U.S.C. 452. Although the Federal Rules of Appellate Procedure and the local rules of the courts of appeals establish schedules for the consideration of appeals, Fed. R. App. P. 2 permits a court of appeals to suspend the appellate rules "[i]n the interest of expediting decision." The advisory committee note to Rule 2 states that "[t]he primary purpose of this rule is to make clear the

[15] In view of the special sensitivity under the First Amendment of even a brief prior restraint, as well as respondents' claims of irreparable injury resulting from such an order, the temporary restraining order reasonably could be regarded as having the same substantive impact as a preliminary injunction, which is immediately appealable under 28 U.S.C. 1292(a)(1). See *Sampson* v. *Murray*, 415 U.S. 61, 86-87 (1974); *OPM* v. *AFGE*, 473 U.S. 1301, 1304-1305 (1985) (Burger, Circuit Justice); *Belknap* v. *Leary*, 427 F.2d 496, 498 (2d Cir. 1970); cf. *National Socialist Party* v. *Village of Skokie*, 432 U.S. at 45. See generally 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.20[5] (2d ed. 1987).

power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules."[16] In light of respondents' claims concerning the pressing concern to the Journal and to the public of any prior restraint on publication, there is no reason to believe that the First Circuit would have ignored its duty to assure expedited consideration of an appeal. Indeed, if the restraining order was as manifestly invalid as the court of appeals believed when it entertained respondents' collateral attack on that order in these contempt proceedings, it presumably would not have taken long for the court of appeals to reach the same conclusion if respondents had sought direct review of the order. Cf. *Walker*, 388 U.S. at 319.[17]

c. The federal system thus afforded the means for respondents to obtain expeditious consideration of their First Amendment objections to the temporary restraining order. Those procedures are fully consistent with this Court's holding in *National Socialist Party* v. *Village of Skokie*, 432 U.S. at 44, that "[i]f a State seeks to impose a restraint [on expression], it must provide strict procedural safeguards, *Freedman* v. *Maryland*, 380 U.S. 51 (1965), including immediate appellate review, see *Nebraska Press Assn.* v. *Stuart*, 423 U.S. 1319, 1327 (1975) (Blackmun, J., in chambers)." See also *Vance*, 445 U.S. at 316-317; *Morland*, 443 U.S. at 709; *Southeastern Promotions*, 420

[16] See also Rule 27.1 of the Rules of the United States Court of Appeals for the First Circuit.

[17] If the court of appeals had refused to grant relief on a timely basis, respondents could have applied to this Court for a writ of mandamus (see, *e.g.*, *Morland* v. *Sprecher*, *supra*), a stay of the district court's order pending the First Circuit's disposition of the appeal (see, *e.g.*, *M.I.C. Ltd.* v. *Bedford Township*, 463 U.S. 1341, 1343 (1983) (Brennan, J., Circuit Justice)), or a writ of certiorari before judgment (see *Morland*, 443 U.S. at 712 (White, J., dissenting)).

U.S. at 559-562. Accordingly, under *Walker*, respondents were obligated to seek review of the order within the judicial framework. See *United States* v. *Dickinson*, 465 F.2d 496, 511 (5th Cir. 1972).

4. The en banc court of appeals concluded (Pet. App. A49) that respondents should not be held in contempt because it did not have a "clear conviction" that emergency relief could have been obtained from the court of appeals within the period of 8-1/2 hours between the entry of the district court's order and the hour at which respondents had to decide whether to include the article in the next day's editions of their newspaper. As an initial matter, there is no reason to believe that the court of appeals would have been unable to entertain any submission by respondents within that period. At the very least, respondents were under an obligation to present the matter to that court, since they were under a presumptively valid restraining order that barred the publication. And even if we assume that respondents could ever have been excused from at least attempting to seek relief on direct review of the allegedly unconstitutional order (but cf. *Engel* v. *Isaac*, 456 U.S. 107, 130 (1982)), respondents bore the burden of justifying their failure to do so. See *Walker*, 388 U.S. at 319. The en banc court therefore clearly erred in excusing respondents from the consequences of their deliberate disregard of the judicial process on the ground that the court was not convinced that relief actually would have been available.

The more fundamental flaw in the en banc court's reasoning, however, is its assumption that the question whether there was an adequate opportunity for appellate relief must be determined by reference to respondents' own publishing deadlines. To be sure, respondents were of the view that any delay in the publication of the material at issue was a continuing violation of the First Amendment and would cause irreparable injury (cf. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 560-561 (1976)), and that their interest in publishing at will was not outweighed by

the interest of the courts in having sufficient time for "mature consideration of the questions involved" (*Morland*, 443 U.S. at 712 (White, J., dissenting)) and the interest of the plaintiff in having his claim considered on the merits prior to publication. But the manner in which those interests should be weighed was not for respondents to decide. That was a *judicial* function, to be performed by the district court, the court of appeals, or this Court in ruling on an application by respondents for emergency relief. For just as a party cannot "make himself a judge" of the validity of an order at the time it was entered, "and by his own act of disobedience set [it] aside" (*Gompers*, 221 U.S. at 450), so too a party cannot make himself a judge of whether the order should continue in effect pending the time that the appropriate court determines is required for appellate review.

Respondents' preferred publishing schedule of course was a factor that an appellate court would have taken into account—along with the possibility of irreparable injury to other parties, the likelihood of success on the merits, and the public interest—in determining the course and timing of appellate proceedings. But the First Amendment did not render respondents' self-imposed deadline for publishing the material a binding deadline for the courts to perform their responsibility of disposing of the case presented to them. See *Dickinson*, 465 F.2d at 511-512.[18]

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[18] We note as well that two factors in this case undermine any claim of urgency in the publication of the material. First, the article at issue here reported conversations that had taken place more than 20 years earlier, and therefore did not constitute the sort of fast-breaking news for which immediate publication is intrinsically necessary. Second, as of November 13, 1985, the Journal had been in possession of the FBI memoranda and logs for almost five months. J.A. 96-97. Although another newspaper had published an article based on the same materials, respondent Hauser testified that the Journal was not influenced in its publishing decision by the prospect that other newspapers were "rushing into print" (*id.* at 142-143). Moreover, the fact that the Journal's banner headline in the November 14 editions

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5. Because respondents failed to invoke facially adequate procedures for setting aside the temporary restraining order on direct review, they cannot collaterally attack that order in these contempt proceedings. Contrary to the belief of the en banc court (Pet. App. A49), this was not a new requirement, announced for the first time in its opinion. As we have explained, that requirement has been a fundamental principle of contempt jurisprudence from the earliest days, and it was followed in essentially identical circumstances in *Walker*. See 388 U.S. at 319-321. The en banc court of appeals therefore erred in excusing respondents from their procedural default because of a supposed lack of awareness of a duty to seek relief from the temporary restraining order.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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concerned the court's restraining order, rather than the substance of the material, suggests that respondents might have decided to publish the material specifically *because of*, not in spite of, the restraining order. See also *id.* at 124, 139-141, 150, 183.

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No. 87-65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,

Petitioner,

—v.—

PROVIDENCE JOURNAL COMPANY and
CHARLES M. HAUSER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' MOTION TO DISMISS THE WRIT OF CERTIORARI

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UNITED STATES OF AMERICA,

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PROVIDENCE JOURNAL COMPANY and
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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' MOTION TO DISMISS THE WRIT OF CERTIORARI

Respondents Providence Journal Company and Charles M. Hauser respectfully move this Court for an order dismissing the writ of *certiorari* in this case for the reasons set forth below. The petition for a writ of *certiorari* was granted on October 5, 1987. The grounds for this motion did not and could not have become evident to counsel for respondents until after the petition was granted.

THE BASIS FOR THE INSTANT MOTION

The questions presented by this motion are whether the petition for a writ of *certiorari* filed in the name of the United States of America was, in fact, properly filed on behalf of the United States, and whether the United States may lawfully be represented in this Court by a special prosecutor appointed by

the district court (Hon. Francis J. Boyle, C.J.) but not authorized to represent the United States by the Attorney General or the Solicitor General. 28 U.S.C. § 518(a) provides that the Attorney General, the Solicitor General or their designee shall conduct and argue all cases before this Court "in which the United States is interested." In *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987) ("*Young*"), a majority of this Court concluded that courts have inherent authority to initiate contempt proceedings for alleged disobedience of court orders. It did not, however, rule that, notwithstanding the explicit language of section 518(a) to the contrary, a writ of *certiorari* on behalf of the United States may be sought and the United States represented in this Court by a special prosecutor who has not obtained the authorization of the Attorney General or the Solicitor General. That is what has occurred and is occurring in this action.

This is a matter of fundamental import, relating to the ability of the Congress and the executive, through the legislative process, to exercise control over who is authorized to speak for the United States in this Court, and to ensure that decisions as to what matters are presented on behalf of the United States for consideration and ultimate resolution are confided to those in whom they repose trust.

The background of the newly revealed circumstances giving rise to this motion is not in dispute. When the *Providence Journal* published its article of November 14, 1985, Raymond J. Patriarca ("Patriarca"), plaintiff in the underlying action, filed a "Motion to Adjudge in Contempt" (JA 223).[1] The district court did not turn to the United States Attorney to prosecute as required by this Court's subsequent holding in *Young* because, the court said, the United States Attorney represented "parties who are defendants in this action" (JA 237). That reason, now deemed by the Solicitor General to be

1 References to "JA __" are to appropriate pages of the Joint Appendix in this case.

"insufficient" (S.G. Br. at 1)[2]—and Patriarca's own refusal to serve as prosecutor in the contempt proceedings he commenced—led the court to appoint a special prosecutor pursuant to Federal Rule of Criminal Procedure 42(b) (JA 237). That prosecutor conducted this litigation at the district court level and in the Court of Appeals. After the Court of Appeals ruled that the convictions at issue should be vacated and clarified the procedures to be followed in such circumstances in the future, the special prosecutor proceeded to file a petition for a writ of *certiorari* in this Court. The Solicitor General's brief, *amicus curiae,* leaves little room for doubt that it was the special prosecutor who determined to file the petition for a writ of *certiorari* in this action and did so in the name of the United States without the authorization of the Solicitor General or the Attorney General (S.G. Br. at 2-3 n.2).[3] We urge in this motion that the petition was not filed by the United States of America and that this appeal is not being conducted by the United States of America. That being so, the writ of *certiorari* should be dismissed.

2 In light of the potential for confusion in referring to two briefs filed by different entities, each purportedly on behalf of the United States, we refer to the brief of the United States of America as petitioner as "Petitioner's Brief" or "Pet. Br. __" and to the "Brief for the United States as *Amicus Curiae* Supporting Petitioner" as the "Solicitor General's Brief" or "S.G. Br. __."

3 Until the filing of the Solicitor General's brief, *amicus curiae*, respondents were not aware that the special prosecutor was not authorized by the Attorney General or the Solicitor General to conduct proceedings before this Court on behalf of the United States. It is for that reason that respondents have raised this issue now by way of motion. *See* R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice*, § 16.8(b) (6th ed. 1986).

ARGUMENT

The petitioner in this appeal is said to be the United States of America. It is in the name of that sovereign that the petition for a writ of *certiorari* was filed seeking to reinstate a finding of criminal contempt, the imposition of a $100,000 fine, an 18-month jail sentence (which has been suspended), and other sanctions. Yet, special counsel appointed by Judge Boyle was never authorized to file a petition for a writ of *certiorari* on behalf of the United States, nor was he ever authorized to conduct or argue the case on behalf of the United States in this Court.

Section 518(a) provides:

> Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the United States Claims Court or in the United States Court of Appeals for the Federal Circuit and in the Court of International Trade in which the United States is interested.

28 U.S.C. § 518(a) (1982).[4]

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4 The Attorney General has delegated his authority under section 518(a) to the Solicitor General by way of regulation which provides:

> The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Solicitor General, in consultation with each agency or official concerned:
>
> (a) Conducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments, and . . . settlement thereof.
>
> (b) Determining whether, and to what extent, appeals will be taken by the Government to all appellate courts . . . .

28 C.F.R. § 0.20 (1987). This regulation has the "force of law." *See United States* v. *Nixon*, 418 U.S. 683, 695 (1974). Just as the regulation at issue in the *Nixon* case, "[s]o long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and enforce it." *Id.* at 696.

This appeal is not one in which the United States has merely some peripheral interest, *Brawer* v. *Horowitz*, 535 F.2d 830 (3d Cir. 1976); rather, it is one in which the United States is itself the petitioner, the entity seeking to reinstate a judgment which involves a possible prison sentence for one defendant and a substantial fine for another. Both in his *amicus* brief (S.G. Br. at 2) and in his motion for divided argument, the Solicitor General makes it clear that the United States has a "significant interest" in this case. Motion For Divided Argument and For Leave to Participate in Oral Argument at 2. Despite that "interest," the United States is being represented and has been represented in this Court not by the Attorney General or the Solicitor General, nor by their designee, but by a special prosecutor whose "client" is a single judge who determined to prosecute a contempt, to defend an appeal from his finding of contempt, and then to seek a writ of *certiorari* from the decision reversing that contempt. It does not overstate the point to say that, when all this occurs in the name of the United States, this is a case—at least as a matter of affording a plain reading to section 518(a)—"in which the United States is interested."

Section 518(a) reflects the clear intention of Congress that the United States speak with one voice before this Court and that the decision-making power as to what positions should be taken on behalf of the United States should rest in the Attorney General or the Solicitor General. Long before Congress chose to delineate the broad duties now specifically conferred on the Attorney General (*see* 28 U.S.C. §§ 501 *et seq.* (1982)), it made clear the special role of the Attorney General to conduct the business of the United States before this Court.[5] This special role has been explicitly recognized by this Court:

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5 As originally proposed, section 35 of the Judiciary Act of 1789 gave the United States Supreme Court the power to appoint the Attorney General of the United States, who was charged with the duty "to prosecute and conduct all suits in such Courts in which the United States shall be concerned . . . ." Congress rejected that proposal,

Control of these suits, therefore, while they were pending in the Circuit Court, belonged to the district attorney under the general superintendence and direction of the Attorney-General, and he might, if he had seen fit, have discontinued them at any stage of the proceedings prior to the appeals. *Such control on the part of the district attorney ceases whenever such a suit, civil or criminal, is transferred to this court by writ of error, appeal, or certificate of division of opinion, as the thirty-fifth section of the Judiciary Act also provides, that it shall be the duty of the Attorney-General to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and such has been the unbroken practice of this court in such suits from the organization of the judicial system to the present time.* Appointed, as the Attorney-General is, in pursuance of an act of Congress, to prosecute and conduct such suits, argument would seem to be unnecessary to prove his authority to dispose of these cases in the manner proposed in the respective motions under consideration, but if more be needed, it will be found in the case of *The Gray Jacket*, in which this court decided that in such suits no counsel will be heard for the United States in opposition to the views

choosing instead to vest that power in the President. C. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 109 (1923). As enacted, section 35 of the Judiciary Act provided in pertinent part:

> And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States who shall be sworn or affirmed to a faithful execution of his office; *whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned*, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.

Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 93 (emphasis added).

> of the Attorney-General, not even when employed in behalf of another of the executive departments of the government.

Confiscation Cases, 74 U.S. (7 Wall.) 454, 458 (1868) (emphasis added; footnote omitted).

As the Court observed in *United States* v. *Winston*, 170 U.S. 522, 524 (1898):

> When a case in which the government is interested comes to this court from any lower court it falls by the terms of the statute within the special care of the Attorney General.

After setting forth the terms of the statute, now codified as 28 U.S.C. § 518, the Court continued:

> Under this section the Attorney General may, in his discretion, make other arrangements for the management of such a case, but this discretion does not abridge the fact that the full responsibility and control are imposed directly upon him as the head of the Department of Justice.

170 U.S. at 525.[6]

6 Congress has created one limited exception to section 518. When creating the United States Court of Claims and the United States Court of Appeals for the Federal Circuit and adding them to the courts listed in section 518(a) in which the Attorney General and Solicitor General "shall conduct and argue suits," it made an exception for "'the authority of the Tennessee Valley Authority . . . to represent itself by attorneys of its own choosing'" in the courts listed in section 518(a). *Cooper* v. *Tennessee Valley Authority*, 723 F.2d 1560, 1563 (Fed. Cir. 1983) (discussing 28 U.S.C. §§ 41, 171-177 (1982)). Congress did the same thing when creating the Court of International Trade and adding it, too, to section 518(a). *Id.* at 1564 (discussing 28 U.S.C. § 251 (1982)). While the United States has an obvious interest in cases involving its agency the Tennessee Valley Authority, Congress has decided that the TVA should be allowed to represent itself before this Court. The Solicitor General's office, as well, has recognized the TVA's authority to conduct its cases before this Court. *Algernon Blair Industrial Contractors, Inc.* v. *Tennessee Valley Authority*, 540 F. Supp. 551, 555 (M.D. Ala. 1982).

In his brief before this Court in *Young* itself, the Solicitor General specifically recognized the force of section 518 and its requirement that a special counsel appointed under Rule 42(b) could not conduct proceedings in this Court on behalf of the United States without specific authorization from the Solicitor General. And, in *Young*, the Solicitor General gave his specific authorization for special counsel to proceed.[7] The position of the Solicitor General now is that, in light of this Court's decision in *Young*, no such authorization "is required in order for the specially appointed private attorney to seek review in this Court on the district court's behalf." (S.G. Br. at 3 n.2) Thus, the Solicitor General maintains, the United States should not be deemed "interested" in a case prosecuted by a special prosecutor "on a district court's behalf" in the name of the United States, but only in "cases in which the United States is 'interested' by virtue of the constitutional and statutory responsibilities of the Executive Branch." (S.G. Br. at 2 n.2) The Solicitor General cites no authority for his position and it is difficult to see how this Court's decision in *Young*—where no

7 In his brief before this Court in *Young*, the Solicitor General advised the Court as follows:

> The respondent in each of these cases is the United States, albeit on the relation of private entities, and the United States is the proper opposing party in any prosecution for criminal contempt. . . . This case therefore would appear to fall within the scope of 28 U.S.C. 518(a), which provides that unless "the Attorney General in a particular case directs otherwise," the Solicitor General is to conduct and argue all cases in this Court "in which the United States is interested." However, in order to assure that the Court may have the benefit of the arguments in support of the appointment of interested private counsel in a case such as this, the Solicitor General has authorized the counsel who were appointed by the district court to appear on behalf of the respondent in this Court as well. Accordingly, the Solicitor General files this brief on behalf of the United States as *amicus curiae* to express the distinct views of the Executive Branch.

Brief for the United States, as *Amicus Curiae*, in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, Nos. 85-1329, 85-6207 at 2 n.1.

specific statutory command such as section 518 was at issue—can be read to support the view that a statute specifically addressed to the representation of the United States before this Court can be so easily overcome.

It is true, of course, that the plain command of section 518 could result in a situation where a special prosecutor who would otherwise choose to do so would be precluded from seeking review by this Court where the Attorney General declines to authorize him to do so. Yet that is a decision clearly within the province of Congress. U.S. Const. art. III, § 2; *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).[8] Here Congress has spoken quite clearly. It can hardly be subject to dispute that the legislative branch has the power to vest authority in the Attorney General to determine which cases will be presented to this Court and how those cases will be presented in order to ensure that the United States as sovereign will pursue justice for the public good in an orderly and stable way.

Putting aside the disregard for the plain language of section 518 that the Solicitor General's reading requires, there is, to be sure, a case to be made that, in light of this Court's conclusion in *Young* that it is essential for the judiciary to be empowered to punish disobedience to judicial orders "without complete dependence on other branches" (107 S.Ct. at 2131), a district court should be permitted to determine on its own when and whether to seek review by this Court. But any such argument surely proves too much. It permits any aggrieved district court judge, as Judge Boyle, who appoints a special prosecutor to determine for himself whether or not to seek *certiorari* in a criminal contempt case prosecuted to vindicate what he believes to be the dignity of his court. It transforms the voice of the "United States" in such a case into the voice of that single

8 In fact, for more than 100 years, criminal cases from the federal courts were not generally reviewable in the Supreme Court. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 1539 n.3 (2d ed. 1973).

judge.[9] Surely the "United States" for whom the special prosecutor would purport to speak in such an appeal would be a sovereign far narrower than "the United States as the sovereign composed of the three branches . . . ." *United States* v. *Nixon*, 418 U.S. 683, 696 (1974). Indeed, the "United States" for whom the special prosecutor claims to speak in this appeal is not even the entire judiciary, since no central judicial repository exists to play the role of the Solicitor General's office in determining a uniform position for that branch of government. The "United States" that sought the writ of *certiorari* granted by this Court, and that has been and is conducting this appeal, is thus nothing more than the same district court judge who considered the dignity of his court to have been affronted.[10]

To give effect to section 518 does not, in any event, leave the judiciary powerless to enforce its lawful orders. A district judge may, subject to the restrictions of *Young* itself, appoint a

9 This result is particularly troubling where, as here, the United States, in the form of the Department of Justice, had argued to the district court that it lacked subject matter jurisdiction over the underlying action (JA 184, 227-232) and the same United States, in the form of the special prosecutor, has argued to this Court not only that the district court had subject matter jurisdiction but that the question of the district court's jurisdiction over the underlying action is determinative of the merits of this appeal (Pet. Br. at 17-18 & n.5).

10 It is worth posing the question of what would have happened if, as *Young* enjoins district judges to do (and as the Solicitor General maintains should have been done here), Judge Boyle had requested the Department of Justice to prosecute this appeal. If the Department had done so and had obtained a conviction, the conviction had been reversed by the First Circuit and the Department of Justice had determined not to seek a writ of *certiorari*, could Judge Boyle have required it to do so? If the Solicitor General's interpretation of *Young* is correct, it should follow that Judge Boyle and not the Solicitor General should determine whether a petition were to be filed. But there is surely no warrant yet recognized in law which would require the Department of Justice to petition this Court to issue a writ when the Department believed it would be against the interests of the United States to do so.

special prosecutor; that contempt proceeding will be heard and resolved by the judiciary alone. Any appeal of a conviction will, as here, be heard and decided by the Court of Appeals. It is hardly an affront to judicial dignity when such judges determine that a conviction should not stand.[11]

The difficulties engendered by permitting a special prosecutor not appointed by the Attorney General or Solicitor General to represent the United States are well illustrated in this case. Here, the special prosecutor's "United States" has argued that "[i]f there is any exception to the general rule" that court orders must be obeyed, "it arises only where there might be lack of jurisdiction due to be (*sic*) bad faith of the Court." Pet. Br. at 32 n.15. Yet, the Solicitor General's brief acknowledges, to the contrary, that "a party may not be held in criminal contempt for violation of an order that exceeds the jurisdiction of the issuing court." *See* S.G. Br. at 11. The special prosecutor defends the district court's extensive reliance on the previous ruling of the First Circuit, which affirmed, while Patriarca's father was alive, the FBI's denial of the *Journal*'s Freedom of Information Act request. According to the special prosecutor, "*The Journal*, as a party to the prior litigation, presumably knew very well of the First Circuit's rulings regarding the materials in question. . . . It nevertheless resumed its efforts to obtain the information about Patriarca which was constitutionally protected." (Pet. Br. at 33) The Solicitor General's brief, in contrast, offers not a word in support of a misreading of law so plain that it condemns the *Journal* simply for

11 The contempt convictions in this case arose before the Court of Appeals clarified the procedures for challenging an unconstitutional prior restraint, which it did in this case. That the Court of Appeals determined that those convictions could not stand is not unlike the situation in *United States* v. *McKenzie*, 735 F.2d 907 (5th Cir. 1984). There the Court of Appeals for the Fifth Circuit held that where the very district court that had appointed special prosecutors to pursue a contempt conviction later dismissed the contempt charges, the special prosecutors did not represent the United States and could not appeal that dismissal on behalf of the United States.

renewing an FOIA application with the FBI after the significantly changed circumstances of Patriarca's father's death.[12]

This Court has recently taken pains to assure itself that a party that claimed to be before it actually represented the entity for which it claimed to speak. The failure of a state formally to appeal a judgment striking down one of its statutes, even though it did remain a party in the appeal and did file a document in this Court advising that its position was "essentially co-terminous" with that of private appellants defending the statute, has been held to leave the court without a case or controversy to decide. *Diamond* v. *Charles*, 106 S.Ct. 1697, 1703-04 (1986) (to be officially reported at 476 U.S. 54). The failure of state representatives who had filed an action on behalf of a state legislative body to remain in the positions they had previously held has been held to deprive them of the standing they previously had to pursue an appeal. *Karcher* v. *May*, 56 U.S.L.W. 4022 (U.S. Dec. 1, 1987) (No. 85-1551).

12 Several courts have indicated that the death of an individual who is the subject of an FOIA request for agency records, in addition to the passage of time, is a valid criterion for consideration by an agency in determining whether disclosure would constitute an unwarranted invasion of privacy. *See e.g.*, *Kiraly* v. *Federal Bureau of Investigation*, 728 F.2d 273, 277-78 (6th Cir. 1984); *Diamond* v. *Federal Bureau of Investigation*, 707 F.2d 75, 77-78 (2d Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984); *Powell* v. *United States Department of Justice*, 584 F. Supp. 1508, 1526 (N.D. Cal. 1984).

CONCLUSION

Here, a writ of *certiorari* was purportedly sought on behalf of the United States by individuals without authority to seek it. The appeal in this matter has been conducted and argument noticed by persons who, given section 518(a), do not represent the United States. The writ of *certiorari*, in these circumstances, should be dismissed.

Respectfully submitted,

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No. 87-65

In The
Supreme Court of the United States
October Term, 1987

UNITED STATES OF AMERICA,

Petitioner,

v.

PROVIDENCE JOURNAL COMPANY and
CHARLES M. HAUSER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S OBJECTION TO RESPONDENTS' MOTION TO DISMISS THE WRIT OF CERTIORARI

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In The
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S OBJECTION TO RESPONDENTS' MOTION TO DISMISS THE WRIT OF CERTIORARI

Petitioner respectfully objects to respondents' motion for an order dismissing the writ of certiorari.

REASONS FOR OBJECTION

This case is about a direct, deliberate affront to the district court and respondents' arrogation to themselves of judicial power to determine the rights of a suitor. As this Court has recently stated, " 'there could be no more

important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience.'" *Young v. United States ex rel. Vuitton et Fils S.A.*, — U.S. —, 107 S.Ct. 2124, 2131 (1987), citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911). The special prosecutor is pursuing that duty in this case.[1] Unless permitted to do so, the district court will be left without "an independent means of self-protection" and its orders for the protection of citizens' rights would become merely advisory. *Young*, 107 S.Ct. at 2132.

The special prosecutor is not required to obtain leave of the Attorney General to pursue review by this Court.[2] *See Young*, 107 S.Ct. at 2130, 2131-32, 2133, 2134, 2136. Indeed, the Solicitor General does not believe that 28 U.S.C. § 518(a) applies to this case. (S.G. Br. 2-3 n.2). That is, the Solicitor General and Department of Justice attorneys have concluded that in light of *Young*, they "do not believe that authorization of the Solicitor General is required in order for the specially appointed private attorney to seek review in this Court on the district court's behalf." (S.G. Br. 3 n.2).

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[1]As explained in the "list of parties" section of the petition for certiorari, the caption of the case below was *In The Matter of Application to Adjudge The Providence Journal Company and its Executive Editor, Charles M. Hauser, In Criminal Contempt*. The caption was changed from an "In The Matter of" style only to conform to what petitioner's counsel understands to be the Court's preference for a caption indicative of the adversary nature of the proceeding. R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice*, § 6.18(d) (6th ed. 1986).

[2]It is true that the Solicitor General declined to authorize the special prosecutor to appear before this Court in this case or file a petition for writ of certiorari.

Young held, among other things, that courts have inherent power to initiate criminal contempt prosecutions for disobedience to their orders independent of having to rely upon another branch of government to do so. 107 S.Ct. at 2130, 2131-32. Courts therefore should not have to rely upon the Executive Branch to determine whether or how such prosecutions should proceed. 107 S.Ct. at 2131, 2132, 2134. If, in a criminal case, the prosecuting party, the "United States," is a party which can only be composed of all three branches, then this holding in *Young* presumably would not have been reached. In recognizing this independent, inherent power of the Judicial Branch, the Court gives added validity to the concept of separation of governmental powers.

Young went on to explain that a court should ordinarily first request the appropriate prosecuting attorney to prosecute criminal contempt actions; a private attorney should be appointed only if that request is denied. 107 S.Ct. at 2134. The appointment of the private attorney here was before *Young* was handed down.[3] The order appointing the special prosecutor indicates that it was made

> In accord with the provisions of Rule 42(b) of the Federal Rules of Criminal Procedure, since the United States Attorney for the District of Rhode Island represents parties who are Defendants in this action...

(J.A. 237).

---

[3]The order appointing the special prosecutor vested him "with *full* authority to prosecute the pending Motion for Contempt of this Court's Order of November 13, 1985." (J.A. 237-38) (emphasis added).

The parties to the underlying litigation which were represented by the United States Attorney were, along with the media defendants, under the restrictions of the November 13, 1985 temporary restraining order. (J.A. 221). In addition, and quite significantly, the United States Attorney at the November 13, 1985 chambers conference and thereafter defended his clients by taking the position that the court lacked subject matter jurisdiction. (J.A. 172, 227, 229, 230, 231, 232). That argument has never been accepted nor could it be; clearly, the court had jurisdiction to resolve the constitutional claims brought before it. *Bell v. Hood*, 327 U.S. 678, 684 (1946). Where the United States Attorney had adopted a "no jurisdiction" position as his defense of his various clients, he created an irresolvable conflict which would bar his objective handling of the criminal contempt matter.

28 U.S.C. § 518(a) concerns participation in this Court by the Attorney General and the Solicitor General in cases "in which the United States is interested." Since the special prosecutor was appointed by the district court under Fed. R. Crim. P. 42(b), rather than by the Executive Branch's attorney under 28 U.S.C. § 543 or otherwise, the "interest" of the United States in this case would be limited to the district court and the public's interest in and need for the prosecuton. *Young*, 107 S.Ct. at 2136.

The proposition that the Attorney General's authorization is necessary before a special, private and independent prosecutor can appear before this Court cannot be squared with the holdings in *Young*. In *Young* the district court entered a criminal contempt conviction. After that judgment was affirmed by the Court of Appeals for the

Second Circuit, defendants petitioned for a writ of certiorari. That petition, of course, was granted. At some point, as it happened, Executive Branch permission was given to the special prosecutors in *Young* to appear before this Court. (Respondents' motion to dismiss 8 n.7). The question here is whether special prosecutors now, i.e., since *Young*, can only appear here at the allowance of the Executive Branch's attorney. We submit that notwithstanding 28 U.S.C. § 518(a), specially appointed attorneys in any other case which reaches this Court need not obtain the Attorney General's leave to appear. For, if authorization be denied by the Executive Branch, and, as here, the Attorney General opts not to take over prosecution, the judgment in vindication of the court's authority will be left with no one to speak for it.

That is, the affronted court would be left without power to protect itself from violations of its decrees. Again, *Young* holds that courts have inherent power to protect themselves exclusive of reliance upon other branches of government. 107 S.Ct. at 2131, 2133, 2134. Therefore, the proposition that the Attorney General's authorization is needed for a special prosecutor to appear in this Court—or in any other court for that matter—cannot stand.

If 28 U.S.C. § 518(a) is considered in an absolute sense, even this Court would be powerless to appoint a prosecuting attorney where the Attorney General declines to grant the prosecutor authority to appear here. *But see, e.g., Merrimack River Savings Bank v. City of Clay Center*, 219 U.S. 527, 535-36 (1911); *United States v. Shipp*, 203 U.S. 563, 572 (1906) (the Supreme Court has power, like lower courts, to punish contempts of its authority).

Such a result and the vesting of such exclusive power in the Executive Branch should not be permitted. *See Bob Jones University v. United States,* 456 U.S. 922, 459 U.S. 812 (1982), 461 U.S. 574, 585 n.9 (1983); (the Court appointed an attorney to brief and argue in support of the judgments below when the United States refused to defend its position taken in the lower courts that a private university which practiced racial discrimination did not qualify for tax exemption under the Internal Revenue Service Code); *see also* 51 U.S.L.W. 3295, 3296 (U.S. May 24, 1983) (No. 81-3) (summarizing argument in *Bob Jones University*); R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice,* § 13.13, 574, § 14.2, 581 (6th ed. 1986).

In *United States v. McKenzie,* 735 F.2d 907 (5th Cir. 1984), the district court dismissed criminal contempt charges instituted by its special, private prosecutor. The private prosecutors for that reason were no longer necessary to protect and vindicate the district court's power and, therefore, were no longer authorized to do so. Here, however, a conviction was entered by the district court. The special prosecutor here, with the district court and the public's interest in mind, had good reason to believe that the court of appeals incorrectly reversed the conviction. Hence, the petition for certiorari was filed.

Respondents argue that 28 U.S.C. § 518(a) reflects a clear intention for the United States to speak with one voice. (Respondents' Motion to Dismiss 5, 6-7). *But see Bob Jones University v. United States, supra.* Ironically, in *Young* the Solicitor General took an opposing position to the private, interested special prosecutor. Here, the Solicitor General and the special prosecutor, who is

disinterested, have filed consistent briefs.[4] The special prosecutor's actions and arguments therefore essentially have been ratified by the Solicitor General.

Respondents cite *Diamond v. Charles,* 476 U.S. 54, 106 S.Ct. 1697 (1986), and *Karcher v. May,* — U.S. —, 56 U.S.L.W. 4022 (U.S. Dec. 1, 1987) (No. 85-1551). Those cases were dismissed because the parties had no standing to appeal. Petitioner here, the United States of America, certainly has standing as the Court may grant certiorari to any party in a criminal case. 28 U.S.C. § 1254(1); *see United States v. Gulf Refining Co.,* 268 U.S. 542, 544-45 (1925). Respondents' motion does not address the standing of petitioner but rather seems to raise the question of whether its attorneys are properly before the Court. Petitioner's attorneys' participation here would seem to have been confirmed by the Court's recent holding that the judiciary ought not be dependent upon other branches for protection of direct affronts. *Young,* 107 S.Ct. at 2131, 2133, 2134.

———o———

[4]Respondents argue that the briefs of the special prosecutor and the Solicitor General are inconsistent. (Respondents' Motion to Dismiss 11). As an example, respondents seem to state that the Solicitor General recognizes that a court must have jurisdiction before it can punish a party for violation of an order but that the special prosecutor does not fully agree with that principle. This is simply inaccurate. The special prosecutor has always taken the position that jurisdiction is required before one can be held in contempt for violation of an order. (Pet. App. 7; Pet. Br. 16, 17, 28 n. 13, 29, 32).

CONCLUSION

The motion to dismiss the writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,

Petitioner,

—v.—

PROVIDENCE JOURNAL COMPANY and CHARLES M. HAUSER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS

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55 pp

QUESTIONS PRESENTED

1. May a newspaper publisher and its editor, who are accused of criminal contempt of court for violating a prior restraint on publication entered by a federal district court by publishing an article based on information lawfully obtained by the publisher from the FBI under the Freedom of Information Act, defend themselves in the contempt proceeding on the ground that the prior restraint was unconstitutional and transparently invalid?

2. Did a federal district court have subject matter jurisdiction to enter a prior restraint on publication of information lawfully obtained by a newspaper from the FBI under the Freedom of Information Act?

3. May a federal district court within the First Circuit, consistent with the due process clause of the Fifth Amendment, hold a newspaper publisher and its editor in contempt of court for testing the constitutionality of a prior restraint on publication in precisely the way the Court of Appeals for the First Circuit had previously concluded such orders may be tested?

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IN THE

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OCTOBER TERM, 1987

No. 87-65

UNITED STATES OF AMERICA,

Petitioner,

—v.—

PROVIDENCE JOURNAL COMPANY and CHARLES M. HAUSER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

On November 8, 1985, Raymond J. Patriarca ("Patriarca") commenced an action against the Federal Bureau of Investigation, its director William H. Webster, the Department of Justice, Attorney General Edwin Meese and against the Providence Journal Company ("the *Journal*")[1] and WJAR TELE-

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1 A statement pursuant to Rule 28.1 of the Rules of this Court regarding parent companies, subsidiaries and affiliates of the Providence Journal Company appears as footnote 1 to the Respondents' Brief in Opposition to the Petition for a Writ of *Certiorari*, previously filed with this Court. Since that brief was filed, Icchi Communications Corporation has ceased to be an affiliate of the Providence Journal Company; Michiana Telephone Company and Savannah Cellular Telephone Company have since become affiliates of the Providence Journal Company.

VISION TEN ("WJAR"). (JA 72, 206)[2] The action related to "the defendant's dissemination of logs and airtels compiled [by the FBI] during the course of an illegal electronic surveillance during the years 1962 to 1965" of Patriarca's deceased father, Raymond L.S. Patriarca.[3] (Complaint, ¶ 8; JA 207-08)

According to the Complaint, the action was brought under the Freedom of Information Act, 5 U.S.C. § 552 (1982 & Supp. III 1985), with subject matter jurisdiction bottomed on that Act and on Title III of The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.* (1982 & Supp. III 1985). (Complaint, ¶¶ 8, 9; JA 207-08) The Complaint makes no assertion of jurisdiction under the Fourth Amendment or any other constitutional provision. (JA 207-08)

The governmental defendants, the Complaint asserted, had wrongfully authorized the release of the illegally obtained data to both the *Journal* and to WJAR "pursuant to [a] request made by them under the Freedom of Information Act." (Complaint, ¶ 17; JA 209) WJAR, the Complaint alleged, already had "disseminated portions of logs furnished" to it to the public. (*Id.* at ¶ 18; JA 209) The *Journal*, the Complaint alleged on information and belief, was "in the process of

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2 References to "JA _____" are to appropriate pages of the Joint Appendix in this case. References to "PA _____" are to appropriate pages of the Appendix to the Petition for a Writ of *Certiorari*.

3 Raymond L.S. Patriarca has long been identified as what the Solicitor General's brief characterizes as "a senior member of a New England organized crime 'family.' " (S.G. Br. 3) A 1965 report by the Committee on Government Operations of the United States Senate labeled the elder Patriarca as the "Mafia boss" of Providence, R.I., and Boston, Mass., and set forth the infrastructure of his "crime family." S. Rep. No. 72, 89th Cong., 1st Sess. 43-45 (1965). As recently as 1985, it was the position of the United States that the elder Patriarca, until his death in 1984, was the "Boss" of "the Patriarca Family of La Cosa Nostra which operated in the District of Massachusetts, Rhode Island and elsewhere." *United States* v. *Angiulo*, Indictment No. 83-00235 (D. Mass.). After the death of the elder Patriarca, his son was described by the Attorney General of Rhode Island as the "new head of organized crime in New England." *Providence Journal-Bulletin*, Nov. 17, 1984, p. A-1.

preparing for the dissemination" of the information "in its newspapers." (*Id.* at ¶ 19; JA 209)

At the same time the Complaint was filed, Patriarca filed a Motion for Temporary Injunction and/or Injunctive Relief seeking, *inter alia*, an order "enjoining the named defendants from disseminating or publishing logs and airtels compiled as a result of the electronic surveillance" conducted between March of 1962 and July of 1965. (JA 217-18) The motion was supported by a four-paragraph affidavit of counsel to Patriarca which asserted that "the dissemination and publication of the logs and airtels would cause irreparable harm, damage and injury" to Patriarca (JA 219-20) and a two-page memorandum which referred to the Fourth Amendment to the Constitution and to various sections of the Freedom of Information Act. (Plaintiff's Memorandum at 2)[4]

The *Journal* was served with the Patriarca Complaint, motion and other accompanying papers on Tuesday, November 12, 1985. (Abrams Letter at 1; PA 29) The following day, November 13, 1985, the District Court, per Francis J. Boyle, Chief Judge, held a chambers conference at 12:30 p.m. on Patriarca's motion. (JA 33, 176) At the conference of about

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4 For the convenience of the Court, Respondents have lodged with the Clerk of the Court four documents that were before the Court of Appeals for the First Circuit when this appeal was heard by that court, but are not part of the Record here for technical reasons. Two of these documents, although included in the Appendix before the First Circuit, were never formally docketed by the District Court. These are: (1) Plaintiff's Memorandum in Support of Motion for Temporary Restraining Order and/or Injunctive Relief ("Plaintiff's Memorandum"); and (2) Federal Defendants' Objection to Plaintiff's Motion For Injunctive Relief ("Federal Defendants' Objection"). The third document is a letter from Floyd Abrams, Esq., to Mr. Francis P. Scigliano, Clerk of the First Circuit, dated September 12, 1986, answering a question raised by Judge Coffin during oral argument of this appeal in that court ("Abrams Letter"). The fourth document is the brief, *amicus curiae*, filed on behalf of the United States in the First Circuit, in which the Justice Department took the position that the District Court lacked jurisdiction under Title III to enter its order restraining the *Journal* from publishing its article about Patriarca ("Federal Defendants' *Amicus* Brief").

one-half hour (at which no transcript was made) the District Court briefly heard counsel. (JA 41) Counsel for the *Journal* opposed the issuance of any restraint on publication on the ground that any such order would constitute a prior restraint forbidden by the First Amendment. (JA 170-71) The United States, as well, opposed the granting of the temporary restraining order (JA 171-72). As Judge Boyle recalled the conference, it was specifically argued to him that under the Freedom of Information Act the court had "no jurisdiction to do anything." (JA 184) Nonetheless, despite the fact that Patriarca's Complaint had not even cited the Fourth Amendment as a basis for any claim against the *Journal* (JA 207-08, 183-84), the court was convinced that what it understood to be the emerging clash between the Fourth Amendment and the First Amendment (JA 182) was presented in the case.[5] As Judge Boyle recalled it, after being advised that there was no jurisdiction for the claim under the Freedom of Information Act, he responded by saying that "it didn't seem to me that the Freedom of Information Act had changed the Constitution or the Fourth Amendment." (JA 184) Convinced that Fourth Amendment principles had to be weighed against ones rooted in the First Amendment, over the objections of counsel to the *Journal* and the government (and tc the "surprise" even of counsel to Patriarca (JA 172)), the court entered a temporary restraining order barring publication of the logs and airtels by the named defendants, including the *Journal*. (JA 37-38) Judge Boyle was prepared to hear argument on the motion for a preliminary injunction the next morning, November 14. After counsel to Patriarca advised the court that he had another

5 Judge Boyle noted that he had recently attended a lecture at the Judicial Conference for the First Circuit in which a case was discussed involving an individual who had saved President Ford's life, who was identified in a newspaper article as being homosexual and who then sued the newspaper on privacy grounds. (JA 184) The case referred to by Judge Boyle neither involved an application for a prior restraint nor a claim bottomed upon the Fourth Amendment. The claim, based on common law privacy principles, was dismissed by the California courts. *See Sipple* v. *Chronicle Publishing Co.*, 154 Cal. App. 3d 1040, 201 Cal. Rptr. 665 (1984).

matter scheduled on that day before a different judge, a matter he stated he would contact the judge "to work . . . out" and that he believed he "probably could straighten out," counsel to the *Journal* requested that the case be heard later than the morning of November 14 so that he could better prepare for the argument. (JA 167, 168) The District Court, in the words of Patriarca's counsel, "was accommodating everyone" (JA 167) and scheduled the hearing on plaintiff's motion for 10:00 a.m. on Friday, November 15, 1985.

Around dinner time on November 13, Charles M. Hauser, the executive editor of the *Journal*, was first advised of the court order. (JA 121) He had discussions with other executives on the newspaper who had learned of the court order that afternoon. A variety of considerations were discussed including the risks of non-compliance with the order ("[w]e were extremely concerned with the fact that our decision involved disobeying an order of the Federal Court" (JA 122)); the nature of the order ("[t]here was no question in our minds that it was a Prior Restraint" (JA 123)); the dangers of compliance with the order ("[w]e considered that failing to publish in the next edition of 'The *Journal*' would be a clear signal to people that frequently like to block publication of something . . . [that] they could use the courts to block publication" (JA 124)); and alternatives to publishing ("of course, the question of appealing from the ruling came up . . . but our understanding was that there was no practical way to appeal that night from a temporary restraining order" (JA 125)).[6] Mr. Hauser knew, as well, that some of the material about Patriarca furnished by the FBI had previously been broadcast by a television station and published by another newspaper, *The Hartford Courant*. (JA 141)

6 On cross-examination of Mr. Hauser in the contempt hearing, he stated that his deputy executive editor James V. Wyman, who was the "regular liaison with the attorneys," had told him that "[i]t was not practical or it was futile to attempt to appeal a Temporary Restraining Order." (JA 149)

After weighing what he understood to be the *Journal*'s options, Mr. Hauser decided to proceed with an article based on information provided by the FBI to the *Journal* under the Freedom of Information Act. (JA 140) On November 14, 1985, the *Journal* published one article concerning Patriarca and his father and another about Judge Boyle's order. (JA 18, 39, 49)

The District Court conducted a hearing on Friday, November 15, 1985, on the topic of whether the restraining order should remain in effect. (JA 66) The court continued the restraining order and set the following Tuesday, November 19, 1985, for a hearing on the preliminary injunction sought by Patriarca. (JA 64) In Judge Boyle's view, as expressed in his ruling declining to lift the restraint, although "the rule is well established that there shall be no prior restraint of a free exercise of the press rights conferred by the First Amendment" (JA 60) there was "something to the argument that an injunction at this point is not a prior restraint . . . ." (JA 62) At the close of the hearing on November 15, counsel for the *Journal* requested the court to enter a preliminary injunction rather than to continue in effect the temporary restraining order so as to enable the *Journal* to take an immediate appeal. (JA 65) Judge Boyle responded that he understood that "if you have a restraining order you have some difficulties with an appeal," but declined to alter his order. (*Id.*) On November 19, 1985, the court conducted a further hearing and then entered an order vacating its temporary restraining order, denying preliminary injunctive relief against the *Journal* and the other media defendants, and granting a preliminary injunction against further dissemination by the FBI or the United States Department of Justice of logs or airtels generated by the 1962-65 electronic surveillance. (JA 85)

Patriarca's counsel filed a motion to adjudge the *Journal* in contempt on November 14, 1985. (JA 223-25) When he declined to prosecute the *Journal*, the District Court, without seeking to have the Department of Justice undertake the prosecution, invoked Fed. R. Crim. P. 42(b) and appointed a

special prosecutor, William A. Curran, Esq., to do so. (JA 237-38)[7] The court ordered the *Journal* and Hauser to show cause why they should not be adjudged in criminal contempt, and scheduled a hearing for February 10, 1986. The *Journal* and Hauser waived their right to jury trial. (JA 202) Following a hearing, at which the special prosecutor and the defendants stipulated to an agreed statement of facts which was made part of the record (JA 33-113), the District Court adjudged the defendants guilty of criminal contempt. (JA 239-40)

The opinion of Judge Boyle relied heavily on the fact that the *Journal* had, in 1976, sought and been refused by the FBI access to the same information it had sought again in 1985 after Patriarca's death. Since the former decision of the FBI had been affirmed by the Court of Appeals for the First Circuit, Judge Boyle concluded, the *Journal* remained "bound" by it despite its renewed application and the FBI's changed decision to provide the materials. *Providence Journal Co.* v. *FBI*, 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980).

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7 The Solicitor General takes the position in his brief that the District Court's stated reasons for doing so—the fact that the FBI and the Department of Justice were defendants in the action commenced by Patriarca—were "insufficient." (S.G. Br. 1) From the time of the appointment of the special counsel to this date, the case has been prosecuted by the special counsel. The decision to seek *certiorari* was made by the special counsel and the appeal to this Court has been conducted by and argument noticed on behalf of the United States by the special counsel. This procedure is in direct conflict with 28 U.S.C § 518(a) (1982), which requires that the "conduct and argu[ment]" of all cases in this Court "in which the United States is interested" shall be by the Attorney General, the Solicitor General or their designee. A separate motion has consequently been made on behalf of respondents to dismiss the writ of *certiorari* on the ground that the petition for a writ of *certiorari* was not properly filed on behalf of the United States and that the United States may not lawfully be represented in this Court by anyone not authorized to do so by the Attorney General or the Solicitor General. Respondents' Motion To Dismiss The Writ Of *Certiorari*, filed December 16, 1987.

As for the specific issues raised in the contempt case, Judge Boyle first concluded that "significant legal issues" had been raised (PA 11) and that subject matter jurisdiction was present. The court then rejected the stipulation of the parties (JA 34-35) that the *Journal* had received the information lawfully (PA 14) and turned to what it believed to be the critical Fourth Amendment issue. Reasoning that "it does not do violence to the constitutional scheme if a free press were required to respect Fourth Amendment personal security" (PA 16), the court concluded that "the clash between the First and Fourth Amendments" required "at least a brief time to consider the merits of this action." (PA 17)

Rejecting the contention of the *Journal* that the collateral bar rule should not be held to apply where a judicial order bars "pure" speech (as opposed to speech mixed with conduct as was at issue in *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967)), Judge Boyle concluded that there was no relevant distinction between the legal impact of injunctions which barred conduct such as marches and strikes and those which barred speech alone. (PA 19-20) The *Journal*, Judge Boyle finally concluded, had "seized the judicial power to itself," decided its own case by violating his order, and was in contempt. (PA 22)

On April 2, 1986, following a further hearing on sentencing, the court imposed an 18-month jail sentence on Hauser, suspended the sentence, ordered Hauser to perform 200 hours of public service and fined the *Journal* $100,000. (JA 194-97)

The Court of Appeals reversed the contempt convictions. The initial opinion of the court, written for a unanimous panel by Judge Wisdom, concluded that the temporary restraining order entered by Judge Boyle was a transparently invalid prior restraint on pure speech which had been properly tested by the *Journal* by violating it.

The Court of Appeals opinion identified two distinct interests it believed should be reconciled. One was the interest reflected in the First Amendment antipathy to prior restraints,

what the court characterized as "the most significant" of all the constitutional imperatives protecting a free press. (PA 30) The other, equally well established, was the "requirement of any civilized government that a party subject to a court order must abide by its terms or face criminal contempt." (PA 32)

The court pointed out that although the latter principle, the collateral bar rule, was a principle of general applicability, this Court had held that orders entered by courts without personal or subject matter jurisdiction were not subject to the rule and that orders referred to in *Walker* v. *City of Birmingham* as "transparently invalid" were not either. (PA 34) Distinguishing between "transparently invalid" orders and ones that are merely invalid, the court acknowledged, was not easy and could generally be accomplished only by assuming that if an order had any pretense to validity at the time it was issued, it must be obeyed. However, the court held, some orders, such as that at issue here, are so patently unconstitutional that they should be excepted from the collateral bar rule. Orders barring pure speech, the court concluded, are distinguishable from those—as in *Walker* v. *City of Birmingham*—involving conduct or conduct and speech. (PA 45)

Turning to each of the three grounds adverted to by Patriarca for the injunctive relief sought against the *Journal*, the court rejected each as even a conceivable basis for a prior restraint. The First Circuit's own ruling in the *Journal*'s earlier effort in the 1970s to obtain access to the Patriarca material was, the court concluded, simply a recognition that the FBI had discretion not to release the material (PA 38); the FOIA was rejected as even a possible source of power for an injunction (*id.*); Title III was held to provide no basis for a prior restraint (PA 39); and the Fourth Amendment, so emphasized by Judge Boyle, was held to apply only to government action, not that of the press (*id.*). Finally, the court concluded that although the *Journal* arguably could have appealed to the Court of Appeals or sought a writ of *mandamus* (which the court described as "difficult to obtain" (PA 44 n.70)) that

course of conduct should not be required in the case of an order so transparently invalid. (PA 44)

It was the last of these conclusions only that the court reconsidered when the special prosecutor filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. The court granted the suggestion for rehearing *en banc* and issued its own *en banc* opinion as an addendum to, and modification of the panel opinion, which, as modified, it adopted. (PA 47)

In the *en banc* opinion, the court held that henceforth a publisher subject to a temporary restraining order which the publisher considers to be transparently unconstitutional should nonetheless make a good faith effort to seek emergency relief from the appellate court. (PA 48) As to the instant case, however, the *en banc* court stated that it lacked "a clear conviction that timely emergency relief was available within the restraints governing the publisher's decision making" and that it would be unfair to impose such substantial sanctions upon the publisher for its failure to have followed the procedure just announced. (PA 49)

SUMMARY OF ARGUMENT

At the heart of this appeal, as considered in Section I of this brief, is the question of whether two nearly absolute rules of transcendent importance to principles of freedom and order can be reconciled. One is a proposition that is as nearly absolute as any that arises from the Bill of Rights: prior restraints barring the publication of news are inconsistent with the First Amendment. The rule has been phrased in various ways, sometimes in terms of the "presumptive unconstitutionality" of prior restraints,[8] more recently by referring to prior

8 *See, e.g., New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971) (*per curiam*) ("*Pentagon Papers Case*"); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971).

restraints on publication as "the most serious and least tolerable infringement on First Amendment rights."[9]

At the same time, there can be no effort to minimize the general desirability of what has come to be known as the collateral bar rule. The proposition articulated by this Court in *Walker* v. *City of Birmingham* that "respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom," 388 U.S. at 321, remains as true today as when written. So does the proposition that there are particular characteristics of the judiciary, unlike other branches of government, which generally require obedience to court orders, even if they are incorrect.

In this case, the question is whether these propositions can be reconciled. The briefs of both the petitioner and the Solicitor General[10] see no need for accommodations at all; both urge that the obligation to obey judicial orders is such that in no situation should the invalidity of the order constitute a defense in a later contempt action. This brief rejects that absolutism, urging that although federal court orders must generally—and, indeed, nearly always—be obeyed until reversed, there are already well-recognized exceptions to that rule and that the collateral bar rule should not be deemed applicable in cases involving alleged violations of presumptively unconstitutional court orders barring pure speech. That conclusion is, as we demonstrate, consistent with virtually every court ruling re-

9 *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976). *See also Lowe* v. *Securities and Exchange Comm'n*, 472 U.S. 181, 224 (1985) (a "prior restraint on speech is, as applied to fully protected speech, presumptively invalid and may be sustained only under the most extraordinary circumstances") (White, J., concurring, joined by Rehnquist, J., and Burger, C.J.).

10 To avoid confusion between reference to the brief of the United States as Petitioner (written by the special prosecutor) and that of the "United States as *Amicus Curiae* Supporting Petitioner" (written by the Solicitor General), we refer to the former as "Petitioner's Brief" or "Pet. Br. _____" and the latter as the "Solicitor General's Brief" or "S.G. Br. _____."

garding prior restraints on pure speech since *Walker* v. *City of Birmingham*.

In Section II of this brief we demonstrate, as an alternative ground for a ruling in favor of the *Journal* and its executive editor, the absence of subject matter jurisdiction in the District Court. All agree that, pursuant to 18 U.S.C. § 401(3) (1982), courts may punish only "[d]isobedience or resistance" to a "lawful" order of the court. Since an order entered without jurisdiction cannot be deemed lawful, we urge in this section that the court's lack of subject matter jurisdiction is fatal to the contempt conviction.

Finally, in Section III of the brief, we urge that the imposition in this case of criminal sanctions on the *Journal* and its executive editor would violate due process of law as guaranteed by the Fifth Amendment. Given the fact that the Court of Appeals for the First Circuit had itself concluded only five years before the instant case that an order banning publication of pure speech could be tested "by violating it and contesting the resulting contempt sanction," *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720, 724 (1st Cir.), *cert. denied*, 449 U.S. 1021 (1980), we urge that criminal punishment of the defendants cannot be squared with the Fifth Amendment.

ARGUMENT

I.

THE ENTRY BY THE DISTRICT COURT OF A PRIOR RESTRAINT PROHIBITING PUBLICATION BY A NEWSPAPER OF LAWFULLY OBTAINED INFORMATION WAS PATENTLY UNCONSTITUTIONAL AND INVALID AND THE COLLATERAL BAR RULE SHOULD NOT BE HELD TO PRECLUDE DEFENDING AGAINST A FINDING OF CRIMINAL CONTEMPT

The submissions of both the petitioner and the Solicitor General offer a single refrain: this case involves the vindication of one and only one interest; that interest is the principle that federal court orders must be obeyed; since the *Journal* did not obey Judge Boyle's temporary restraining order, so the argument goes, the collateral bar rule enunciated in a torrent of cases culminating in *Walker* v. *City of Birmingham*—a case, the Solicitor General claims, that arose in "essentially identical circumstances" (S.G. Br. 30)—requires the conclusion that the finding of contempt against the *Journal* and its editor be reinstated. This reasoning is clear enough, but it simply ignores all competing considerations: the existence and weight of one of the most deeply rooted of all constitutional principles, the nearly absolute First Amendment bar on prior restraints on speech; the fact that the collateral bar rule itself has long been held to be subject to significant, if narrow, exceptions; the fact that in *Walker* itself restraints on pure speech, such as are involved here, were distinguished from restraints on conduct; and the ease with which general adherence to the collateral bar rule could accommodate an exception in cases involving prior restraints on pure speech as distinguished from speech and conduct.

A. The Order Of Judge Boyle Was An Unconstitutional Prior Restraint On Expression

We start with what should be undisputed: the temporary restraining order entered by Judge Boyle on November 13,

1985, barring publication by the *Journal* of information lawfully obtained by it from the FBI constitutes a prior restraint on freedom of expression. That the restraint was intended to be brief does not change its character. "A prior restraint," this Court has emphasized, "has an immediate and irreversible sanction" such that "the temporary nature of a restraint" does not reduce the heavy burden imposed on the government to justify it. *Nebraska Press Ass'n* v. *Stuart*, *supra*, 427 U.S. at 559. In the same term that the Court decided *Nebraska Press Ass'n*, a plurality of this Court phrased the same point in a different way: "[t]he loss of First Amendment freedoms, for even minimal periods of time," the Court said, "unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976).[11]

That this Court should have viewed even the briefest of prior restraints as raising the most profound dangers to a free society reflects the extraordinary level of distrust continually exhibited

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11 Justice Brennan's concurring opinion in the *Pentagon Papers Case* contains similar conclusions:

> "I write separately in these cases only to emphasize what should be apparent: that our judgments in the present cases may not be taken to indicate the propriety, in the future, of issuing temporary stays and restraining orders to block the publication of material sought to be suppressed by the Government. . . .
>
> "[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And therefore, every restraint issued in this case, whatever its form, has violated the First Amendment—and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue." (403 U.S. at 724-27)

See also Nebraska Press Ass'n v. *Stuart*, *supra*, 427 U.S. at 572 (Brennan, J., concurring).

in decisions of this Court about any and all prior restraints on free expression. In fact, so consistent are the authorities to the effect that the "chief purpose of the [First Amendment] guaranty [is] to prevent previous restraint upon publication," *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931), and that "prior restraints on speech and publications are the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n* v. *Stuart*, *supra*, 427 U.S. at 559, that legal debate has tended to relate to how the nearly total ban on prior restraints should be articulated rather than whether the ban exists. In a number of opinions prior and subsequent to *Near* v. *Minnesota*, the ban on prior restraints on publication was expressed as an absolute. *See*, *e.g.*, *Patterson* v. *Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907); *Grosjean* v. *American Press Co.*, 297 U.S. 233, 249 (1936); *Kunz* v. *New York*, 340 U.S. 290, 307 (1951) (Jackson, J., dissenting). In *dictum* in *Near*, a possible narrow exception in certain national security cases was adverted to; in the *Pentagon Papers Case*, the same extraordinary narrow exception was discussed; in *Nebraska Press Ass'n*, the possibility that Sixth Amendment considerations could lead in some future case to a valid prior restraint was considered.[12] In no

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12 In both the *Pentagon Papers Case* and the *Nebraska Press Ass'n* cases, this Court, while eschewing absolutist rejection of all prior restraints, established tests so difficult to meet that they may fairly be described as near absolute in character. In the *Pentagon Papers Case*, the critical concurring opinion of Justices Stewart and White concluded that absent proof that publication would "surely result in direct, immediate, and irreparable damage to our Nation or its people," no restraint could issue. (403 U.S. at 730) In *Nebraska Press Ass'n*, the Court established tests so demanding that it should come as no surprise that as of October, 1987, it could be assessed that the Court had "set barriers so high that it is doubtful that a prior restraint on coverage of a trial will ever be upheld," Abrams, *Prior Restraints*, 3 *Communications Law 1987* 7, 15 (PLI 1987). It is noteworthy that five members of this Court in *Nebraska Press Ass'n* concluded that prior restraints on publication of any lawfully obtained information about pending trials would likely be unconstitutional. *See* 427 U.S. at 572, 595 (Brennan, J., concurring, joined by Stewart, J. and Marshall, J.) (no "new exception to the rule against prior censorship of publication" should be established); *id.*

press case involving what would otherwise be protected speech under the First Amendment has any prior restraint on speech been affirmed by this Court. In no press case decided by this Court has any exception to the ban on prior restraints on news reporting other than in the national security or Sixth Amendment areas even been considered conceivable.[13] In short, Justice White's conclusion that First Amendment law had created a "virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content," remains as acute today as when written.[14]

To say this is not to quarrel with the proposition that all prior restraints are "not unconstitutional *per se*," *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1975). But that does not mean, as the District Court apparently believed, that there is to be continuing *ad hoc* judicial balancing as to whether particular prior restraints are or are not to be entered. As this Court made clear in *Southeastern Promotions*, "[i]n

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at 570 (White, J., concurring) (expressing "grave doubt" that any prior restraint in this area would "ever be justifiable"); *id.* at 617 (Stevens, J., concurring) ("if ever required to face the issue squarely, [I] may well accept [the] ultimate conclusion" of Justice Brennan's concurrence).

13 One of the rationales the Court articulated for its decision denying a prior restraint in *Nebraska Press Ass'n* was that there was no way of determining that the prior restraint would effectively accomplish what was intended. (427 U.S. at 563) Here, similarly, since other media (including non-parties to the litigation) had the same information which the Government had disclosed to the *Journal*, there could have been no possible finding that the prior restraint would even accomplish its intended purpose. In fact, the Complaint itself alleged that WJAR had *already* "disseminated portions of logs furnished to them." (Complaint, ¶ 18; JA 209) And the parties to the contempt action stipulated that "[t]he material which was the subject matter of the publication by the *Journal* on November 14, 1985, was in the possession of, and had been, or was about to be, published by other media." (JA 35)

14 *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 249 (1974) (White, J., concurring).

order to be held lawful" a prior restraint "first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints. . . ." (420 U.S. at 559) No such previously recognized exception has even been advanced in this action.

Cases involving prior restraints sought to be imposed upon the press involve what this Court has often referred to as "pure speech"—*e.g.*, speech not mixed with conduct. In stark contrast is the expression involved in cases such as *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967),[15] in which this Court upheld a finding of criminal contempt in connection with disobedience of a court order restraining public demonstrations on city streets. In that case the Court went out of its way to distinguish "pure speech" from speech mixed with conduct. Justice Stewart, writing for the majority in *Walker*, quoted with approval the following passage from *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965):

> " 'We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.' " (388 U.S. at 316)

As *Walker* v. *City of Birmingham* demonstrates, the Court has distinguished the special treatment accorded pure speech such as was voiced by the *Journal* from that given other forms of speech and publication which are entitled to lesser degrees of protection. In analyzing prior restraints of activities other than pure speech, such as the use of public facilities (*Southeastern Promotions, Ltd.* v. *Conrad*, *supra*, 420 U.S. at 561-62), the licensing of motion pictures (*Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965)), or participation in demonstrations or other similar activities involving conduct mixed with speech

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15 The decision in *Walker* v. *City of Birmingham* is discussed more fully in Section I.B., *infra*.

(*Cox* v. *Louisiana*, *supra*, 379 U.S. at 555), the Court has approved some restraints which give a reviewing court an opportunity to analyze the challenged activity. Even restraints involving these less-protected areas of speech cannot pass constitutional muster unless they can be "accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Southeastern Promotions, Ltd.* v. *Conrad*, *supra*, 420 U.S. at 559.

Here, however, there is not the slightest suggestion in the briefs of either the petitioner or the Solicitor General that the prior restraint imposed by Judge Boyle could at any time meet any prior restraint test.[16] The order was entered as if a temporary restraining order on pure speech were no different from nor more serious than the most routine of orders maintaining the *status quo*—and as if a bar on previously protected speech could be said simply to maintain the *status quo* when, in fact, by its very issuance it totally eliminated the freedom to decide whether to speak at all. The opinion of the Court of Appeals did not overstate the fallacy of Judge Boyle's view by concluding that:

> "It must be said, it is misleading in the context of daily newspaper publishing to argue that a temporary restraining order merely preserves the status quo. The status quo of daily newspapers is to publish news promptly that editors decide to publish. A restraining order disturbs the status quo and impinges on the exercise of editorial discretion." (PA 42)

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16 Nor could it. At no time did Patriarca make even the most modest evidentiary showing other than his claim that the material at issue had been illegally obtained by the FBI. There were, to say the least, no allegations of perils even remotely similar to the dangers of great magnitude and public consequence identified by this Court as necessary to support a prior restraint. (JA 206-11) It is nowhere alleged—it could not be alleged—that *any* communication which was the subject of the electronic surveillance contained the type of information which could possibly meet the tests set forth in the *Pentagon Papers Case* or *Nebraska Press Ass'n*.

B. Disobedience Of The Unconstitutional Temporary Restraining Order Cannot Subject The Respondents To Criminal Contempt

Since the plaintiff's claims clearly were insufficient to justify any prior restraint upon publication, the restraining order issued by the District Court unconstitutionally violated the *Journal*'s right to publish freely. Nonetheless, the petitioner and the Solicitor General both argue that the failure of the *Journal* to obey Judge Boyle's unconstitutional order, in and of itself, should deprive the *Journal* of the opportunity to defend the contempt case on the basis of the underlying unconstitutionality of the order. The First Circuit held, to the contrary, that where, as here, there is an unconstitutional prior restraint of pure speech which does not even arguably fall into one of the recognized exceptions to the ban on prior restraints and the restraint is subsequently vacated, disobedience of the invalid restraining order should not subject the violator to criminal contempt. (PA 45)

The issue posed is plainly more difficult than that considered previously in this brief. Under most circumstances, there is no question but that federal court orders—however wrongly decided they may be—must be obeyed and that the price of disobedience is the certainty of a contempt conviction. But that rule, significant though it is, is not and has never been thought to be absolute.

In *Walker* v. *City of Birmingham* itself—the case referred to by the Solicitor General as arising in "essentially identical circumstances" (S.G. Br. 30)—this Court indicated the vast difference between that case and this. In *Walker*, which held that the invalidity of an order enjoining petitioners from participating in mass street parades and the like did not serve as a basis for disregarding the order, Justice Stewart's majority opinion took care to distinguish speech mixed with conduct from pure speech. In upholding contempt convictions for violation of a court order that barred street demonstrations, the Court expressed its concern with disobedience of court

orders intended to prevent public disorder and violence. As we noted earlier, the Court explicitly rejected the " 'notion' " that the First and Fourteenth Amendments afforded " 'the same kind of freedom' " to those who engage in conduct such as marching and those who " 'communicate ideas by pure speech.' " (388 U.S. at 316) The Court relied upon its prior ruling in *Cox* v. *Louisiana*, 379 U.S. 559 (1965), a case involving picketing near a courthouse in which the Court had observed that "[w]e are not concerned here with such a pure form of expression as a newspaper comment or a telegram by a citizen to a public official. We deal in this case not with free speech alone, but with expression mixed with particular conduct." (379 U.S. at 564) And the Court emphasized again and again in *Walker* that it was dealing with conduct and the risks of conduct, not speech alone.

> "When protest takes the form of mass demonstrations, parades, or picketing on public streets and sidewalks, the free passage of traffic and the prevention of public disorder and violence become important objects of legitimate state concern. . . . [A]s a unanimous Court stated in *Cox* v. *New Hampshire* [312 U.S. 569 (1941)]:
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> > " 'Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.' " (388 U.S. at 316)

Walker, as well, emphasized that the order entered by the Alabama court was not "transparantly invalid or had only a frivolous pretense to validity." (*Id.* at 315)

Both *Walker* and *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), involved a mixture of conduct and expression as opposed to the pure speech at issue here.[17] The restraining orders in both *Walker* and *United Mine Workers* restrained overt acts which allegedly would have caused public disruption. The restraining order here prohibiting pure speech involved nothing of the sort. On the basis of that distinction, the holdings in cases mandating compliance with later invalidated orders are not at all inconsistent with a rule permitting the subjects of transparently invalid prior restraints of pure speech to defend on the merits when they are accused of criminal contempt. *See Thomas* v. *Collins*, 323 U.S. 516 (1945) (where a Texas registration statute, as applied, prohibited pure speech soliciting union membership, it was unconstitutional and the judgment of contempt was reversed).[18]

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17 In *United Mine Workers*, the Court was concerned that a nationwide coal strike could take place while the courts were attempting to prevent enormous disruption and potential violence. (330 U.S. at 266-67) The lower court issued a temporary restraining order barring the defendants from encouraging mine workers to interfere with the operation of the mines. The defendants violated the temporary restraining order and were convicted of criminal contempt. This Court upheld the contempt convictions. *See* Section II, *infra*.

18 This Court's 1963 *per curiam* decision in *Johnson* v. *Virginia*, 373 U.S. 61 (1963), is also noteworthy. In that case, petitioner Johnson had been convicted of contempt by the Traffic Court of the City of Richmond, Virginia, as a result of his refusal to obey the judge's order that he move from the "section reserved for whites" to the "section reserved for negroes." (*Id.* at 61-62) This Court unanimously held that the contempt conviction could not stand, observing that "a State may not constitutionally require segregation of public facilities." (*Id.* at 62) The Court noted that the petitioner had not behaved "in a boisterous or abusive manner," *id.*, and it did not even allude to any obligation on the part of petitioner to obey an order which is characterized as "a manifest violation of the State's duty to deny no one the equal protection of its laws." (*Id.*) One can easily infer from the *Johnson* case the rule that there is a small class of judicial orders which need not be obeyed, even provisionally, because they are manifestly unconstitutional and indeed subversive of basic constitutional values.

It is true that a broad reading of *Walker* could suggest that all jurisdictionally proper orders,[19] even if invalid, must be obeyed. That is the position urged by both the petitioner and the Solicitor General. But that reading ignores all the distinctions so carefully set forth in *Walker* between limits on pure speech and limits on conduct; it ignores the Court's explicit recognition that "transparently invalid" orders differ from others; it is, at its core, a reading so absolutist that it is one that this Court has *never* provided. Several years after *Walker*, for example, this Court reaffirmed the rule of *Cobbledick* v. *United States*, 309 U.S. 323 (1940), holding that when a motion to quash a subpoena is denied, the movant may either obey its commands or refuse and, if cited for contempt, properly contest its validity in the contempt proceeding. *United States* v. *Ryan*, 402 U.S. 530 (1971). Again, in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), after a motion to quash a subpoena was denied and the defendant refused to testify, the defendant was permitted to raise his First Amendment defense in the contempt proceeding.

Similarly, in a case involving the Fifth Amendment privilege, *Maness* v. *Meyers*, 419 U.S. 449 (1975), an attorney challenged a contempt penalty imposed upon him after he advised a client that he could assert the privilege during trial and refuse to produce subpoenaed material. Although this Court noted the basic proposition that "all orders and judgments of courts must be complied with promptly," *id.* at 458, it pointed out that compliance prior to appeal in this case could cause an irreparable injury that subsequent appellate vindication could not repair. The Court therefore held that the *Ryan* procedure—noncompliance with a review of the privilege at the contempt hearing—would be proper in Fifth Amendment cases. The Court found that such a procedure would be particularly appropriate in such cases given the Fifth Amendment's "ancient roots" and "the place this privilege occupies in the

19 *See* Section II, *infra*.

Constitution and in our adversary system of justice." (*Id.* at 461)

In each of these cases, it could have been held that the protection of the dignity and authority of the judicial system required obedience to the court orders. In fact, if the judicial system were as fragile as both the petitioner and the Solicitor General maintain, it should come as something of a surprise that parties were permitted to mount constitutional challenges in contempt proceedings involving any court orders that they had not obeyed.[20] Yet, in all these cases, the Court accommodated the need for—and the general need for rigor of—the collateral bar rule in situations in which parties would lose the very right they were seeking to vindicate by complying with the order in question.

Here, as in *Maness*, a doctrine with "ancient roots"—our society's abhorrence of prior restraints—would be imperiled by requiring in all circumstances obedience to unconstitutional court orders and by punishing any disobedience, however well-founded. As phrased by one Court of Appeals:

> "If the collateral bar rule applies to an order restraining expression, the would-be speaker faces a Hobson's choice: either violate the order, risking almost certain conviction for contempt, and lose the right to challenge the order's constitutionality, or alternatively, obey the order, seek review, and forfeit, at least temporarily, the very right the would-be speaker seeks to vindicate. The dilemma is particularly acute where First Amendment interests are at stake, for even a temporary restraint on expression may constitute irreparable injury. *Nebraska*

20 As phrased by one scholar, "if the rationale of the collateral bar rule is that one should not be encouraged to act as a judge in his own case, recognition of *any* exception directly undermines that principle by encouraging defendants to decide for themselves whether a judicial order is frivolous." Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va. L. Rev. 53, 95 (1984) (emphasis in original). Professor Redish concludes that "the collateral bar rule can never be justified in the enforcement of a preliminary injunction." *Id.* at 99.

Press Ass'n, 427 U.S. at 559, 96 S. Ct. 2791, *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 182, 89 S. Ct. 347 (1968)." (*In re Halkin*, 598 F.2d 176, 184 n.15 (D.C. Cir. 1979))

The Court of Appeals for the Ninth Circuit, as well, has expressed concern about the possible impact of the application of the collateral bar rule in cases in which unconstitutional prior restraints on pure speech are involved. In that case, a judge ordered NBC to produce a film for his review to determine whether or not to enjoin the broadcast on the day before it was scheduled to be aired. When the film was not produced, counsel for NBC was held in contempt for failing to comply with the court's order. In *Goldblum* v. *National Broadcasting Corp.*, 584 F.2d 904 (9th Cir. 1978), the Ninth Circuit vacated the orders to produce and the contempt order on the ground that the "order to produce the film in aid of a frivolous application for a prior restraint" was itself constitutionally insupportable and "void." (*Id.* at 907)[21] Referring to the risks of the collateral bar rule, Judge Kennedy concluded that:

> "A broadcaster or publisher should not, in circumstances such as those in this case, be required to make a sudden appearance in court and then to take urgent measures to secure appellate relief, all the while weighing the delicate question of whether or not refusal to comply with an apparently invalid order constitutes a contempt." (*Id.*)[22]

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21 The characterization of a prior restraint on publication of pure speech as being void was also made by the Court of Appeals for the Second Circuit in *Crosby* v. *Bradstreet Co.*, 312 F.2d 483 (2d Cir.), *cert. denied*, 373 U.S. 911 (1963).

22 The only case—federal or state—involving pure speech by a newspaper that has interpreted the holding in *Walker* so as to deprive a defendant newspaper of the chance to defend a contempt action on the merits is *United States* v. *Dickinson*, 465 F.2d 496 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973). For reasons set forth in the text and in Judge Wisdom's opinion for the First Circuit (PA 65 n.65), we believe that case was wrongly decided.

The concern expressed in these cases about the risks of applying the collateral bar rule to cases involving the violation of unconstitutional prior restraints on pure speech has been frequently echoed in law reviews,[23] and has led each of the seven states that have considered the question to conclude that in the narrow and rare circumstance of a prior restraint on protected speech, the collateral bar rule should not be applied.[24] These cases are typified by the ruling of the Illinois

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23 One scholar has interpreted the "transparently invalid" caveat in *Walker* in light of subsequent cases to lead to the conclusion that

> "the Court should reject the collateral bar rule for gag order cases in general. Then, when an order was invalid by the Court's standard, the press would not be put to the choice of either forfeiting its constitutional defenses or obeying the unconstitutional order at least for a time." (Barnett, *The Puzzle of Prior Restraint*, 29 Stan. L. Rev. 539, 557-58 (1977)) (footnote omitted).

Another has concluded that if a "silence order" directed at the press is not challenged in court but ignored "the merits of the order should, nevertheless be reviewed in contempt [since] [t]he interests are too basic and the problem too general to require the media to choose between abandoning a constitutional right and being punished for exercising it." Rendleman, *Free Press—Fair Trial: Review of Silence Orders*, 52 N.C.L. Rev. 127, 164 (1973). A third commentator has observed that "refusing to hear collateral attacks may, by seeming to sanction judicial lawlessness, work against the societal interest in fostering respect for judicial processes." Note, *Defiance of Unlawful Authority*, 83 Harv. L. Rev. 626, 635 (1970). A more recent commentator has concluded that the "transparently invalid" language in *Walker* should be understood to cover "the case of an injunction so palpably contrary to authority that it falls under a kind of 'plain error' rule . . . [under which] existing First Amendment precedents would render 'transparently invalid' a vast range of injunctions against speech." Jeffries, *Rethinking Prior Restraint*, 92 Yale L.J. 409, 432 (1983). *See also* Comment, *Defining the "Transparently Invalid" Exception to the Collateral Bar Rule: In Re Providence Journal Co.*, 61 St. John's L. Rev. 311 (1987).

24 Even in cases involving mixed speech and action some state courts have declined to apply *Walker*, based on this Court's caveat that it does not apply to a transparently invalid order. *City of Fitchburg* v. *707 Main Corp.*, 369 Mass. 748, 343 N.E.2d 149 (1976) (injunction enforcing an ordinance that was void on its face will not support contempt); *In re Berry*, 68 Cal.2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968) (*In Bank*) (where restraining order was overbroad and vague, it was issued in excess of the court's jurisdiction and therefore contempt penalty overturned).

court in *Cooper* v. *Rockford Newspapers, Inc.*, 50 Ill. App. 3d 250, 365 N.E.2d 746 (1977). In that case a libel plaintiff obtained an injunction preventing the defendant from editorializing about the suit. The newspaper ignored the injunction, published an editorial and later successfully appealed the constitutionality of the temporary injunction. The trial court then adjudged the newspaper in contempt. The question on appeal was whether the newspaper should have been allowed to raise the constitutional issue at the contempt hearing even though it had published in violation of the injunction. The Illinois court, citing this Court's ruling in *Maness* v. *Meyers*, held that where an injury resulting from an erroneous ruling is irreparable and involves a hallowed constitutional right, violation of the ruling may not be punishable by contempt if it is invalid. The court said:

> "It could, of course, be argued that no great loss of constitutional rights is involved in this case if we hold that the defendants should have withheld their comments pending the orderly—albeit slow—resolution of the propriety of the restraining order in the reviewing courts, or suffer the consequences even if they are upheld on review. But one person's 'orderly processes' may well be another's 'chilled speech'." (50 Ill. App. 3d at 254, 365 N.E.2d at 749)

The court distinguished *Walker* v. *City of Birmingham*, noting it "did not involve a prior restraint on pure speech with the accompanying heavy presumption against the constitutional validity of the order." (*Id.* at 257, 365 N.E.2d at 751) It concluded

> "that the defendants were not subject to the penalty of contempt for asserting their right to comment on the operation of the court system in general or in regard to the particular litigation as to which they were parties because they published in the first instance. Even though it is not presently fully settled law that every prior restraint on pure speech is constitutionally invalid (*Nebraska Press Ass'n* v. *Stuart*, 96 S. Ct. 2791), the heavy presumption against such prior restraints on pure speech must be heavily weighed and deprivation of strongly rooted first amendment rights deemed an irreparable injury, to be permitted, if at all, when the competing interests are overriding." (*Id.* at 256, 365 N.E.2d at 750-51) (footnote omitted)

The courts of six other states—each of which, it may be assumed, was deeply concerned about the necessity of general obedience to court orders—have determined, as well, not to apply the collateral bar rule in pure speech cases. In *State* v. *Coe*, 101 Wash. 2d 364, 679 P.2d 353 (1984) (*en banc*), for example, the court relied on its state constitution to hold that a prior restraint on publication of tape recordings was patently invalid and therefore that a finding of contempt under the state's collateral bar rule was improper. (*Id.* at 373-74, 679 P.2d at 359) The court then demonstrated that the federal rule was actually the same. (*Id.* at 378, 679 P.2d at 361-62)[25] *See State ex rel. Superior Court* v. *Sperry*, 79 Wash. 2d 69, 78, 483 P.2d 608, 613 (*en banc*), *cert. denied*, 404 U.S. 939 (1971) (trial court's prohibiting media from covering court proceedings was void and therefore could not support contempt convictions). *See also Younger* v. *Smith*, 30 Cal. App. 3d 138, 150, 106 Cal. Rptr. 225, 233 (1973) (district attorney who ignored judge's gag

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25 *State* v. *Coe*, *supra*, at 380-81, 679 P.2d at 362-63, also contains the alternative holding that even if *Walker* applied to pure speech cases, a long line of recent cases from this Court makes it clear that orders such as are at issue in this case are "transparently invalid" or have " 'only a frivolous pretense to validity' " and that therefore the doctrine of *Walker*, by its own terms, does not apply. These cases hold that a court cannot restrain publication of lawfully obtained information, even though competing fair trial or privacy issues are at stake. The applicable line of cases starts with *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), continues through *Nebraska Press Ass'n* and culminates in *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308 (1977) (*per curiam*). Taken together, these cases demonstrate that orders requiring the press to be silent as to information it lawfully gathered are at odds with the First Amendment. *Cf. Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978); *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

order and issued an out-of-court statement before appealing or seeking a modification could collaterally attack contempt order); *Wood* v. *Goodson*, 253 Ark. 196, 203, 485 S.W.2d 213, 217 (1972) (order not to publish what transpired in open court held void and subject to collateral attack); *Phoenix Newspapers, Inc.* v. *Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966) (under Arizona constitution court could not prevent publication of what occurred in open court or hold press in contempt based on such a void order); *State* v. *Morrow*, 57 Ohio App. 30, 11 N.E.2d 273 (1937) (since judge's order prohibiting publication of a matter of public record was void, contempt charge failed); *Oliver* v. *Postel*, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972) (court orders infringing First Amendment rights cannot give rise to valid contempt citations) (dictum).

What we urge upon this Court is the adoption of a legal principle substantially similar to that adopted in each of the states that have considered the question. When an order restraining publication is upheld, a party violating the order must live with the adjudication of contempt. The severity of the sanction imposed may, in such circumstances, even be increased, O. Fiss, *The Civil Rights Injunction* 83 (1978). But where the prior restraint is invalidated, the conviction of criminal contempt should be reversed. Since extremely few prior restraint cases involve pure speech,[26] and pure speech cases are not associated with problems of public disorder (unlike cases involving speech mixed with conduct) such a rule is hardly likely to create any administrative burden.

Nor will such a rule of law interfere with the orderly administration of justice or lessen the dignity of the court. Although adherence to court orders is critical to the functioning of the courts, other constitutional principles must be considered as well. The willingness of this Court in *Maness* v. *Meyers* to eschew any enforcement of the collateral bar rule

26 The paucity of such cases may reflect the fact that "[t]he principles enunciated in *Near* [v. *Minnesota*], [have been] so universally accepted," *Nebraska Press Ass'n*, *supra*, 427 U.S. at 557.

that would require forfeiture of another constitutional right offers a model for the interpretation of the rule in this case. The Constitution, after all, protects freedom of speech as well as the independence of the judiciary. Where, as here, First Amendment rights involving free speech will be irreparably injured if a prior restraint is imposed, where the speech involved is pure speech, where the information was lawfully obtained, and where the prior restraint is held to be unconstitutional, a decision to test a court's order by violating it should not automatically result in the tester being transformed into a criminal.

Much of the opposition to this position offered by the petitioner and the Solicitor General focuses not on the interrelationship of our society's abhorrence of prior restraints with its need for obedience to court orders, but on matters which range from the inaccurate to the irrelevant. The petitioner, for example (although not the Solicitor General) persists in defending Judge Boyle's view that because the *Journal* had once been denied the materials it sought under the Freedom of Information Act while Patriarca's father was alive, it was somehow questionable, if not wholly reprehensible, for it to seek the materials again after his death. (Pet. Br. 33) Apart from the fact that this simply misreads the earlier decision of the Court of Appeals denying the previous application (*e.g.*, "[w]e decide only that the FBI may properly turn down this FOIA request . . . ." 602 F.2d at 1014-15), it is bottomed on the unprecedented notion that even to seek materials under the Act is, for some reason, culpable conduct.[27]

27 Several courts have indicated that the death of an individual who is the subject of an FOIA request for agency records, in addition to the passage of time, is a valid criterion for consideration by an agency in determining whether disclosure would constitute an unwarranted invasion of privacy. *See, e.g.*, *Kiraly* v. *Federal Bureau of Investigation*, 728 F.2d 273, 277-78 (6th Cir. 1984); *Diamond* v. *Federal Bureau of Investigation*, 707 F.2d 75, 77-78 (2d Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984); *Powell* v. *United States Department of Justice*, 584 F. Supp. 1508, 1526 (N.D. Cal. 1984).

Another matter raised by both the petitioner and the Solicitor General is the request by the *Journal*'s counsel, after Patriarca's counsel referred to his own scheduling problems (JA 167), for an additional day to prepare for argument on the motion. In retrospect, although such requests are commonplace in other circumstances in which hearings on significant matters are scheduled on short notice, it would surely have been preferable for the request not to have been made in this prior restraint case. That it was made, however, neither demonstrates the sufficiency of an insufficient complaint, nor the presence of the slightest shred of merit to a wholly unmeritorious position.[28] Nor, more importantly, does it suggest that the *Journal* was in the slightest trying to mislead Judge Boyle. In fact, as the uncontradicted testimony of the *Journal*'s executive editor demonstrates, the decision not to abide by Judge Boyle's order was made only after a painstaking review of what were perceived to be the alternatives open to the *Journal*—alternatives, so the *Journal* understood after consultation with counsel, that did not include as a viable option prior to the *Journal*'s publication deadline, the taking of an appeal to the Court of Appeals. (JA 125)

The failure of the *Journal* even to seek to appeal has been much commented upon by both the petitioner and the Solicitor General. Given the ruling in the First Circuit's *en banc* decision that efforts should hereafter be made to appeal from even

28 It is hardly unique for counsel, suddenly confronted with an order inconsistent with the First Amendment which requires immediate compliance of one sort or another, to make statements later sought to be used to demonstrate that First Amendment rights have been waived or are, in fact, nonexistent. *See Goldblum* v. *National Broadcasting Corp.*, 584 F.2d 904, 906 n.1 (9th Cir. 1978) (initial "stipulation" by counsel to broadcaster to comply with court order to produce unbroadcast television film for review excused by court); *In re CBS, Inc.*, 570 F. Supp. 578, 584 (E.D. La. 1983), *appeal dismissed sub. nom. United States* v. *McKenzie*, 735 F.2d 907 (5th Cir. 1984) (initial statement by counsel to broadcaster that client " 'was prepared to comply' " with court order to produce unbroadcast television documentary for review by court held not to constitute waiver of First Amendment right not to produce tape). Such responses should, at the least, not affect the legal analysis engaged in to test the substantive validity of positions taken.

transparently invalid orders until the newspapers' deadline, that conduct should not be expected to occur in the future. In this case, however, a confluence of factors are of note: advice was received by the *Journal* that an appeal would not lie from a temporary restraining order (JA 125, 149); the advice was probably correct as an articulation of the then existing state of the law in the First Circuit;[29] the First Circuit had, in any event, previously concluded that in cases involving pure speech, the subject of the order was free to "test[ ] the court's order by violating it and contesting the resulting contempt sanction";[30] and the First Circuit's *en banc* opinion itself concluded that it was "left without a clear conviction that timely emergency relief was available within the restraints governing the publisher's decision making" (PA 49). Notwithstanding all this, the failure of the *Journal* to seek to appeal may still be viewed as unwise. But it is, at the least, wholly unfair to conclude that the decision not to appeal demonstrates any sort of willful misbehavior or, in fact, anything more than the *Journal* attempting to make a painful decision, as best it could, based on the advice it had received.

In the end, however, the core question raised in this appeal is of a different nature. It is how the values protected by this nation's resistance to and rejection of prior restraints of speech may be reconciled with the necessity of assuring order and the proper respect for judicial decrees. Affirmance of the decision of the Court of Appeals, as modified by the *en banc* ruling, would vindicate both interests.

29 *See Spencer Cos.* v. *Armonk Industries, Inc.*, 489 F.2d 704, 706 (1st Cir. 1973) (temporary restraining order not appealable); *In re Arthur Andersen & Co.*, 621 F.2d 37, 38 (1st Cir. 1980) (difficulty of establishing "indisputable right" to writ of mandamus). Nor did the First Circuit's opinion in this case contradict the *Journal*'s view as to the non-appealability of temporary restraining orders. (PA 44)

30 *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720, 724 (1st Cir.) *cert. denied*, 449 U.S. 1021 (1980). *See* Section III, *infra*.

II.

VIOLATION OF THE DISTRICT COURT'S RESTRAINING ORDER CANNOT, IN ANY EVENT, BE THE BASIS FOR A FINDING OF CRIMINAL CONTEMPT BECAUSE THE COURT WAS WITHOUT JURISDICTION TO ENTER SUCH AN ORDER

There is a second basis, entirely distinct from that previously set forth, upon which the judgment of the Court of Appeals may be affirmed. This Court has repeatedly held that the violation of a court order cannot expose a person to criminal contempt if the court issuing the order lacked subject matter jurisdiction. *United States* v. *United Mine Workers*, *supra*, 330 U.S. at 293-94; *Walker* v. *City of Birmingham*, *supra*, 388 U.S. at 315. *See also In re Burrus*, 136 U.S. 586, 595-96 (1890); *In re Ayers*, 123 U.S. 443, 507-08 (1887). Wholly apart, then, from the issue of whether the *Journal* can be found in contempt for not complying with an unconstitutional prior restraint on its First Amendment right to publish, the precedents of this Court make clear that the finding of criminal contempt was barred by the District Court's clear lack of subject matter jurisdiction.

This is not an instance, as the Solicitor General maintains (S.G. Br. 17), where a "lawful" order within the meaning of 18 U.S.C. § 401(3) (1982) was disobeyed. Rather, because Patriarca's claim to federal question jurisdiction was so "obviously frivolous," the order entered by Judge Boyle fell outside the proscriptions of Section 401(3).

A. The District Court Clearly Lacked Subject Matter Jurisdiction *Ab Initio*

Any analysis of whether a federal district court has subject matter jurisdiction to enter a temporary restraining order to preserve the *status quo* pending a hearing on a preliminary injunction must begin with this Court's decision in *United States* v. *United Mine Workers*, *supra*. There, writing for a plurality of this Court, Chief Justice Vinson concluded that a

federal district court had the power to preserve existing conditions while it determined its own authority to grant relief, if the plaintiff seeking relief presented a substantial claim to federal jurisdiction. (*Id.* at 293) Where the plaintiff's federal jurisdictional claims were "frivolous and not substantial," Chief Justice Vinson noted, disobedience of an order preserving the *status quo* while the court was determining its authority to act is not punishable as criminal contempt. (*Id.*)

This Court's opinion in *United Mine Workers* makes clear that the determining factor is not whether an assertion of jurisdiction is easy. Chief Justice Vinson emphasized that jurisdictional questions are often "close" and may involve difficult factual questions or, as in *United Mine Workers* itself, novel legal issues. (330 U.S. 292-94 & n.57) Rather, proper analysis requires an inquiry into whether the jurisdictional question is substantial, not whether the answer to it is superficially apparent.

Between the two guideposts of a jurisdictional claim that is "frivolous" and one that is "substantial," there is often a substantial amount of room for disagreement.[31] In *Walker*, for example, this Court held that there was a substantial jurisdictional question, because of the strong state interest, when faced with enormously volatile public demonstrations, in regulating the use of streets and other public places. (388 U.S. at 315) This Court therefore upheld lower court convictions for criminal contempt. In *In re Green*, 369 U.S. 689 (1962), in contrast, this Court reversed a conviction for contempt of a state injunction because the case arguably was subject to federal,

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31 Several commentators have criticized the *United Mine Workers* decision vigorously because of the inherent difficulty and uncertainty in applying the standard. *See, e.g.*, Selig, *Regulation of Street Demonstrations by Injunction, Constitutional Limitations on the Collateral Bar Rule In Prosecutions For Contempt*, 4 Harv. C.R.-C.L. L. Rev. 135, 135 (1968); Watt, *The Divine Right of Government by Judiciary*, 14 U. Chi. L. Rev. 409 (1947); Note, *Defiance of Unlawful Authority*, 83 Harv. L. Rev. 626, 633 & n.46 (1970) (and cases cited therein).

rather than state, jurisdiction. The implication of that holding, applying the *United Mine Workers*' standard, is that the jurisdictional claim in *Green* was "frivolous." Here, when Patriarca filed his Complaint, the question of jurisdiction raised no difficult factual questions nor novel legal issues. The Complaint itself cited two bases for jurisdiction, both of which neither the Solicitor General nor the petitioner in their briefs even suggest was proper. Patriarca sought injunctive relief under the FOIA and Title III of the Crime Control Act. (JA 207-08) Since neither basis for jurisdiction even raised a substantial legal question, the District Court should have concluded that it lacked power to act and, accordingly, the *Journal* should not have been adjudged guilty of criminal contempt.

Even as against the United States, let alone against the press, jurisdiction under the FOIA clearly was barred by this Court's decision in *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979). In that case, this Court unanimously held:

> "That the FOIA is exclusively a disclosure statute is, perhaps, demonstrated most convincingly by examining its provision for judicial relief. Subsection (a)(4)(B) gives federal district courts 'jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.' 5 U.S.C. § 552(a)(4)(B). That provision does not give the authority to bar disclosure, and thus fortifies our belief that Chrysler, and courts which have shared its view, have incorrectly interpreted the exemption provisions of the FOIA. . . ."
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> * * *
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> "We therefore conclude that Congress did not limit an agency's discretion to disclose information when it enacted the FOIA. It necessarily follows that the Act does not afford Chrysler any right to enjoin agency disclosure." (441 U.S. at 292, 294).

See also GTE Sylvania, Inc. v. *Consumers Union of the United States, Inc.*, 445 U.S. 375, 378 n.2 (1980).[32]

Just as plainly, there was no basis for the District Court's jurisdiction to entertain a suit for injunctive relief under Title III of the Crime Control Act. (18 U.S.C. §§ 2510 *et seq.* (1982 & Supp. III 1985)) That statute does not retroactively create a private right to injunctive relief against a private party which would bar disclosure of information that was wrongfully intercepted prior to the statute's enactment and disclosed to the party against whom relief is sought. *See, e.g., Zerilli* v. *Evening News Ass'n*, 628 F.2d 217, 221 (D.C. Cir. 1980).

Even more basic to the question of jurisdiction, Title III by its express terms did not create a private cause of action for injunctive relief and did not confer jurisdiction to entertain such a suit when this action was brought.[33] (18 U.S.C. § 2520) As this Court has often stated, "[j]urisdiction is essentially the authority conferred by Congress to decide a given type of case one way or the other." *Hagans* v. *Lavine*, 415 U.S. 528, 538 (1974). Since Congress had conferred no authority on the

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32 The utter lack of jurisdiction under the FOIA was urged upon the District Court from the outset of this case by the United States. (JA 184) In two briefs submitted by the Justice Department, the District Court was made acutely aware that the FOIA provided no basis for jurisdiction in this action. (JA 227-32) In its brief *amicus curiae*, before the First Circuit, the Justice Department urged that the District Court similarly had no basis for jurisdiction under Title III (Federal Defendants' *Amicus* Brief), something Judge Boyle himself acknowledged (JA 81-82).

33 In enacting Title III, it was the unequivocal intention of the Congress that "[i]njunctive relief . . . is not intended to be available." S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2196. Title III was amended in 1986, well after the events at issue in this appeal, to change the law to permit a private plaintiff under the statute to maintain a suit for "such preliminary and other equitable or declaratory relief as may be appropriate." Electronic Communications Privacy Act of 1986, Pub. L. 99-508, Title I, § 103, 101 Stat. 1853. *See* S. Rep. No. 541, 99th Cong., 2d Sess. 27 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 3555, 3581.

District Court to grant Patriarca injunctive relief under Title III, the court was clearly without jurisdiction.

Finally, there can be no basis for concluding that jurisdiction could be premised on plaintiff's Fourth Amendment claims. In the District Court's view (PA 17), the "real 'clash' in this action [was] the clash between the First and Fourth Amendments." It was that "clash" that the court maintained required its reflection to an extent which justified a prior restraint. The court's understanding of the Fourth Amendment in this context was plainly wrong.

Most fundamentally, the Fourth Amendment (which was not even asserted as a basis for jurisdiction by Patriarca against the *Journal* (JA 207-08)) could not possibly be the basis for jurisdiction in an action for injunctive relief against a newspaper since, by definition, a private nongovernmental party such as the *Journal* cannot violate the Fourth Amendment. It has been settled law for more than six decades that the Fourth Amendment applies only to actions by government authorities. "The Fourth Amendment gives protection against unlawful searches and seizures, and . . . its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies. . . ." *Burdeau* v. *McDowell*, 256 U.S. 465, 475 (1921). *See also United States* v. *Calandra*, 414 U.S. 338, 354 (1974); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 335 (1985). Thus, the *Journal* could not possibly infringe upon any right enjoyed by Patriarca under the Fourth Amendment—and a federal district court could not possibly have jurisdiction to entertain a suit brought on such a theory—because no action taken by the *Journal* could conceivably constitute the exercise of sovereign authority.

Notwithstanding all this authority, the District Court bottomed its jurisdiction to issue the restraining order on the supposed violation of Patriarca's Fourth Amendment rights. Apart from the fact that the *Journal* could not—and, of

course, did not—violate those rights, regardless of the *Journal*'s conduct, the District Court clearly lacked subject matter jurisdiction to entertain constitutional claims against the *Journal* absent allegations that the *Journal* was acting under color of state law. *See Fletcher* v. *Rhode Island Hospital Trust National Bank*, 496 F.2d 927, 932 n.8 (1st Cir.), *cert. denied*, 419 U.S. 1001 (1974). In *Fletcher*, the First Circuit held that *Bivens*-type[34] actions are not available against private defendants. Thus, there was no basis at all, not to say any reasonable basis, for concluding that Patriarca had even colorable Fourth Amendment claims against the *Journal*.

Despite the plain lack of jurisdiction in the District Court, petitioner urges upon this Court that Patriarca's claim to federal question jurisdiction was not frivolous because it presented "an unprecedented conflict between first amendment and fourth amendment rights." (Pet. Br. i) The Solicitor General is not so bold. He merely asserts in conclusory fashion in two footnotes that "the question of . . . jurisdiction cannot be dismissed as 'frivolous' " (S.G. Br. 16 n.10) and that cases in which insubstantial claims to federal question jurisdiction have been found are "rare." (S.G. Br. 17 n.12)

Yet this Court has never waivered in its adherence to the long-held rule "that federal jurisdiction cannot be based on a frivolous or insubstantial federal question." *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 106 S. Ct. 3229, 3237 (1986). And it remains clear that a claim to federal question jurisdiction is "obviously frivolous or plainly insubstantial . . . [when] its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Hannis Distilling Co.* v. *Mayor of Baltimore*, 216 U.S. 285, 288 (1910). *Accord Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962) (*per curiam*); *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105-06 (1933). The same is true when a claim purporting to arise under

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34 *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

the Constitution is "so attenuated and unsubstantial as to be absolutely devoid of merit." *Newburyport Water Co.* v. *Newburyport*, 193 U.S. 561, 579 (1904).

Surely there can be no doubt that this Court's decision in *Chrysler Corp.* v. *Brown*, *supra*, squarely holding that the federal courts lack jurisdiction under the FOIA to enjoin disclosure of information, renders Patriarca's claim to jurisdiction under the FOIA "obviously frivolous" and "plainly insubstantial." Just as surely, 65 years of precedent holding that a private party such as the *Journal* is incapable of violating anyone's Fourth Amendment rights renders Patriarca's claim to jurisdiction over the *Journal* under the Fourth Amendment "absolutely devoid of merit." And just as certainly, Title III's deliberate denial of jurisdiction to entertain suits for injunctive relief can only render Patriarca's claim to jurisdiction under that statute completely untenable.

In these circumstances, the only conclusion that may be reached is that the *Journal* did not disobey a "lawful" order within the meaning of 18 U.S.C. § 401(3). There was no substantial claim to subject matter jurisdiction in the instant case that can possibly justify a conviction for criminal contempt.[35]

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35 The Circuit Courts, in a number of cases, have concluded that there can be no conviction for criminal contempt because the claim to subject matter jurisdiction was not substantial. *See, e.g.*, *Jett* v. *Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978) (warden's failure to comply with court order not contempt because, at pre-indictment stage of proceedings, court had no jurisdiction over warden); *Heasley* v. *United States*, 312 F.2d 641, 648-49 (8th Cir. 1963) (once tax sale had been completed, court's jurisdiction ended; order barring dispossessed owner from trespassing on property was void and criminal contempt conviction reversed); *In re Lahm Industries, Inc.*, 609 F.2d 567, 570 (1st Cir. 1979) (since bankruptcy contempt proceeding lacked proper parties, the court lacked jurisdiction, so that criminal contempt conviction was dismissed).

B. The District Court Did Not Enter The Restraining Order To Determine Its Authority To Act

Even if Patriarca had asserted a substantial claim to the jurisdiction of the District Court, there is absolutely no basis to conclude that Judge Boyle entered the restraining order to consider the question of his jurisdiction to entertain the action. From the outset, the District Court concluded that jurisdiction was present because, in its view, Patriarca's Complaint (despite its omission of any reference to Fourth Amendment claims against the *Journal*) raised questions relating to some sort of emerging conflict between the First and Fourth Amendments. (JA 174, 183) From the outset, far from considering its authority to act, the District Court proceeded to weigh the *Journal*'s First Amendment rights against what it perceived to be Patriarca's Fourth Amendment rights *vis-a-vis* the *Journal*.[36]

Unlike the District Court in *United Mine Workers*, which was faced with a novel jurisdictional question and which needed some time to consider it, the District Court in this action determined its authority to act immediately. Given these circumstances, there can be no serious contention that in issuing its restraining order the District Court invoked its jurisdiction to determine jurisdiction. Yet just such an assertion is required by *United Mine Workers* itself in order to invoke the doctrine: "*Pending a decision on a doubtful ques-*

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36 The record is clear that there was never a question in Judge Boyle's mind about his jurisdiction. After declaring at the brief chambers conference on November 13, 1985 that it appeared the *Journal*'s publication would impinge on Patriarca's Fourth Amendment rights, Judge Boyle declined to grant the parties a full hearing on November 15. Instead, he continued the restraining order because he wanted more time to consider "what I'm really interested in . . . this interaction of the Fourth and the [First] Amendment." (JA 69) Judge Boyle's decision rendered on November 19, declining to grant a preliminary injunction against the *Journal*, squarely shows that he had "balanced" the *Journal*'s First Amendment rights against Patriarca's Fourth Amendment rights, and concluded that "[i]t is likely that the Fourth Amendment prohibition would yield to the First, in the circumstances." (JA 81)

tion of jurisdiction, [a] District Court [has] power to maintain the *status quo* and punish violations as contempt." 330 U.S. at 292 (emphasis added; footnote omitted). *See United States* v. *Thompson*, 319 F.2d 665, 667-68 (2d Cir. 1963) (reversing conviction for criminal contempt where *United Mine Workers* doctrine was only basis for jurisdiction and "the [district] court was not seeking to preserve existing conditions pending a jurisdictional determination").

The Solicitor General does not argue, as he cannot, that Judge Boyle, in entering the restraining order, doubted that he had jurisdiction and had invoked the *United Mine Workers* doctrine to assert his jurisdiction to determine jurisdiction. Instead, the Solicitor General urges upon this Court a novel rule: whenever a temporary restraining order is entered to preserve the *status quo*, whatever the reason, that order is "lawful" within the meaning of 18 U.S.C. § 401(3). (S.G. Br. 14-16)

That theory is at odds with this Court's precedents, and sweeps far beyond what this Court held in *United Mine Workers*. Such a reading of the law would grant to district judges *carte blanche* to enter any prior restraint at an initial hearing, whatever the circumstances and however far the judge strayed from already clearly established law. Such a rule would undermine the very concept of the federal courts as courts of limited jurisdiction, let alone deeply rooted and long established principles of law contained in the Bill of Rights.

Here, the District Court never doubted its jurisdiction. There was no invocation of the *United Mine Workers* doctrine to consider its authority to act. The restraining order was entered without jurisdiction, and disobedience of it cannot support a conviction for criminal contempt.

III.

THE *JOURNAL* AND ITS EXECUTIVE EDITOR CANNOT BE PUNISHED FOR CRIMINAL CONTEMPT CONSISTENT WITH DUE PROCESS OF LAW

Criminal contempt proceedings have long been held to require adherence by the government to all the basic protections afforded defendants in the Constitution. *See Bloom* v. *Illinois*, 391 U.S. 194 (1968); *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124, 2132-33 (1987). Not least of those protections is the requirement that defendants not be convicted for conduct that they did not have fair notice was criminal at the time they engaged in it. This has sometimes been phrased in terms of protecting those "who, in justified reliance upon prior decisions" engaged in one course of conduct rather than another. *NAACP* v. *Alabama*, 357 U.S. 449, 457-58 (1958). It has, as well, been said that the question is whether a defendant has been provided (by statutory language or the like) "the fair warning to which the Constitution entitles him." *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964). The theme is consistent: " '[t]he dividing line between what is lawful and unlawful cannot be left to conjecture.' " *Connally* v. *General Construction Co.*, 269 U.S. 385, 393 (1926).

In this case, both the petitioner and the Solicitor General maintain that there has not been the slightest ambiguity in the law to the effect that federal court orders such as that of Judge Boyle may not be disobeyed except upon pain of contempt. As we believe we have demonstrated in Part I of this brief, that is hardly an accurate statement of law as a general matter. It is, in any event, a strikingly and provably inaccurate statement of law as set forth by the Court of Appeals for the First Circuit prior to the *Journal*'s decision to publish.

In *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.) (Coffin, C.J.), *cert. denied*, 449 U.S. 1021 (1980), the Court of Appeals considered a situation in which Arthur Andersen complied with an IRS subpoena of its workpapers

for a client after being ordered by the District Court to do so and after the District Court and the Court of Appeals had denied Andersen's motion for a stay of the court's enforcement order. (*Id.* at 722) Since Andersen had produced all the documents in question, the Court of Appeals held that the controversy was moot, rejecting Andersen's argument that the controversy was " 'capable of repetition yet evading review.' " (*Id.*) Andersen argued that the policy of opposing delays in the enforcement of IRS summonses made it unlikely that a District Court would set a compliance date that allowed time for an appeal and also that a stay pending appeal was difficult to obtain. The Court of Appeals, however, pointed out that Andersen had a third avenue to obtain appellate review: "it can refuse to comply and litigate the merits of the summons as a defense to a contempt citation." (*Id.* at 723) The court noted that:

> "Well established doctrine regarding the appealability of interlocutory orders suggests that the burden of incurring a contempt citation is not an unreasonable one to impose on a party seeking review of a question that will otherwise become moot." (*Id.* at 724)

And in terms directly applicable to this appeal, the Court of Appeals then responded to the argument that since the mootness exception had been held present in *Nebraska Press Ass'n*, it should as well be made applicable to Arthur Andersen. The court stated:

> "It is true that in *Nebraska Press Association* the court applied the mootness exception even though *the newspaper publishers who were enjoined from reporting certain facts regarding an ongoing trial could have tested the court's order by violating it and contesting the resulting contempt sanction.* Similarly, in *First National Bank of Boston* the Court noted that the criminal penalties imposed by a Massachusetts statute prohibiting certain political expenditures by banks 'discourage challenge by violation.' Both of these cases, however, involved prior restraints on arguably protected speech. We believe the Court's unwillingness to require the parties in these cases to invite criminal sanctions in order to obtain appellate review more probably reflected the Court's traditionally disapproving view of prior restraints on speech than a broadly applicable statement on the scope of the 'capable of repetition yet evading review' exception." (623 F.2d at 724) (emphasis added)

What the Court of Appeals stated the newspaper publishers involved in the *Nebraska Press Ass'n* case could have done—to "test the court's order by violating it"—is precisely what the *Journal* did here. That being so, a criminal contempt conviction based on conduct that the Court of Appeals had previously concluded was lawful simply cannot withstand review.[37]

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37 The *Arthur Andersen* ruling was urged in this case upon the Court of Appeals (Br. of Respondents, pp. 25-26) which, given its substantive ruling, did not address it.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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No. 87-65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,

Petitioner,

—v.—

PROVIDENCE JOURNAL COMPANY and
CHARLES M. HAUSER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF RESPONDENTS IN SUPPORT OF THEIR MOTION TO DISMISS THE WRIT OF CERTIORARI

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At issue on this motion is the authority of an individual to represent the United States in this Court when the Attorney General and the Solicitor General have explicitly refused to authorize him to do so. 28 U.S.C. § 518(a) unambiguously provides that unless the Attorney General directs otherwise, either he or the Solicitor General is to conduct all suits and appeals in this Court "in which the United States is interested." The special prosecutor who claims to speak on behalf of the United States has now made explicit that "the Solicitor General declined to authorize [him] to appear before this Court in this case or file a petition for writ of certiorari" (Pet. Obj. 2 n.2).[1] That being so, and because there can be no serious dispute that the United States "is interested" in a criminal contempt case in

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1 References to "Pet Obj. __" are to Petitioner's Objection to Respondents' Motion to Dismiss the Writ of Certiorari.

which it is the party-petitioner, the writ of *certiorari* should be dismissed.

Petitioner suggests that, "notwithstanding section 518" (Pet. Obj. 5), this Court's decision in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987) ("*Young*"), provides authority for a special prosecutor to represent the United States in this Court despite a decision of the Attorney General not to authorize him to do so. Yet nothing in this Court's decision in *Young*—a decision grounded in this Court's supervisory power over the lower federal courts—can be said to have rejected, *sub silentio*, let alone to have held unconstitutional, the specific statutory command embodied in section 518. *Young* did not address the question of who may represent the United States before this Court. Indeed, as petitioner readily admits (Pet. Obj. 5), the Solicitor General in that case specifically authorized special counsel appointed by the district court to appear in this Court on behalf of the United States.

In his attempt to extend this Court's ruling in *Young*, special counsel urges that section 518 should not be given effect on the ground that to do so would be to strip this Court of its powers to punish contempts of its own authority. (Pet. Obj. 5-6) That simply is not so. Respondents do not question this Court's power summarily to punish contempts occurring before it, or, if need be, to appoint a special prosecutor to initiate criminal contempt proceedings—with all the attendant constitutional and procedural safeguards—against one who may violate its orders. *See Young, supra*, 107 S. Ct. at 2131, 2132 n.8, 2134. *See also Bloom* v. *Illinois*, 391 U.S. 194 (1968).

Special counsel points to this Court's invitation to a private attorney to participate in the briefing and argument of *Bob Jones University* v. *United States*, 456 U.S. 922, 459 U.S. 812 (1982), 461 U.S. 574 (1983) ("*Bob Jones*"), and urges that giving effect to section 518(a) would preclude this Court from appointing an attorney in such a case. (Pet. Obj. 6) But this

Court did not appoint a private attorney to represent the United States in *Bob Jones*. The private attorney invited to participate in the briefing and argument of that case appeared—under the terms of this Court's invitation—as *amicus curiae* in support of judgments below with which the United States disagreed and which it hence refused to defend.[2] The United States itself was represented before this Court in *Bob Jones* by the Acting Solicitor General and by an Assistant Attorney General.[3]

It is difficult to understand how it could be said in this case —as the special prosecutor has maintained—that the district court will be left without a means of self-protection by application of section 518. (Pet. Obj. 2) Here the special prosecutor has pursued these criminal charges before both the district court and the Court of Appeals. As in *United States* v. *McKenzie*, 735 F.2d 907 (5th Cir. 1984), here the judiciary itself has already had the opportunity to review the allegedly contumacious conduct and has determined that criminal contempt does not lie. For special counsel now to observe that he "had good reason to believe that the court of appeals incorrectly reversed the conviction" (Pet. Obj. 6)—the same position unavailingly taken by the special prosecutors in *McKenzie*—simply ignores the very holding of that case.

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2 Petitioner's citations to the Stern and Gressman treatise (Pet. Obj. 6) are to the same effect. The authors note that this Court may at any time invite *amicus* participation in any case; they do not address the issue of who may properly represent the United States before this Court. *See* R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice*, §§ 13.13, 14.2, at 574, 581 (6th ed. 1986).

3 Petitioner's reliance on *United States* v. *Shipp*, 203 U.S. 563 (1906), also misses the point. In *Shipp* itself, the United States was represented by the Attorney General and the Solicitor General.

All else aside, special counsel's arguments simply fail to address the proposition that it lies within the province of Congress to decide whether a special prosecutor whom the Attorney General declines to authorize to seek review in this Court on behalf of the United States may nonetheless be permitted to do so. Since Congress has the power to vest in the Attorney General the authority to determine whether and how cases will be presented on behalf of the United States to this Court,[4] and since Congress has spoken clearly on the matter, its determination must be afforded full effect.[5]

4 *See* Respondents' Motion to Dismiss the Writ of Certiorari at 9.

5 When Congress has wished to curtail the Attorney General's discretion to decide whether to allow a special prosecutor to seek review by this Court or otherwise control his prosecutorial duties, it has explicitly done so. In enacting the independent counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C. §§ 591 *et seq.* (1982 & Supp. III 1985), *as amended by* Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293, Congress granted independent counsel wide-ranging authority to investigate and prosecute members of the Executive Branch charged with criminal conduct, including the authority to participate or engage in any litigation he deems necessary, to appeal decisions in cases in which he participates, and to conduct cases in all courts of competent jurisdiction in the name of the United States. 28 U.S.C. § 594(a). *See generally In re Olson*, 818 F.2d 34 (D.C. Cir. 1987) (*per curiam*); *In re Sealed Case*, 665 F. Supp. 56 (D.D.C. 1987), *appeal docketed*, Nos. 87-5261, 87-5264, 87-5265 (D.C. Cir. Aug. 19, 1987); *North* v. *Walsh*, 656 F. Supp. 414 (D.D.C. 1987), *appeal docketed*, Nos. 87-5058, 87-5059 (D.C. Cir. Mar. 13, 1987).

CONCLUSION

The writ of *certiorari* should be dismissed.

Respectfully submitted,

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OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

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PROVIDENCE JOURNAL COMPANY AND
CHARLES M. HAUSER

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO RESPONDENTS' MOTION TO DISMISS THE WRIT OF CERTIORARI

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TO DISMISS THE WRIT OF CERTIORARI

The Solicitor General respectfully moves for leave to file the attached brief for the United States as amicus curiae in response to respondents' motion to dismiss the writ of certiorari.

The petition for a writ of certiorari in this case was filed by private counsel who was appointed by the district court to "prosecute" charges of criminal contempt. Respondents now challenge the power of that court-appointed counsel to file the petition without the authorization of the Solicitor General. Re-

spondents contend that such authorization is required by 28 U.S.C. 518(a), which provides that except when the Attorney General otherwise directs in a particular case, the Attorney General and the Solicitor General shall conduct and argue cases in the Supreme Court "in which the United States is interested."

The question of the court-appointed attorney's authority to file the petition for a writ of certiorari was not raised in either the petition or the brief in opposition. We nevertheless addressed it, albeit only in a footnote, in the brief that was filed at the merits stage on behalf of the United States as amicus curiae on November 25, 1987. It was the footnote in our amicus brief that precipitated respondents' motion to dismiss the writ. Because we did not have an opportunity to answer respondents' arguments, and because those arguments directly concern the powers and duties of the Attorney General and the Solicitor General in cases before this Court, we request leave to filed the attached brief on behalf of the United States as amicus curiae in order to reply to respondents' motion.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JANUARY 1988

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO RESPONDENTS' MOTION TO DISMISS THE WRIT OF CERTIORARI

By motion dated December 16, 1987, respondents have moved to dismiss the writ of certiorari in this case on the ground that the Solicitor General did not authorize the filing of the petition for a writ of certiorari. Respondents contend that the Solicitor General's authorization was required by 28 U.S.C. 518 (a), which provides that, except when the Attorney General otherwise directs in a particular case, the

Attorney General and the Solicitor General shall conduct and argue all cases in this Court in which the United States is interested.

Respondents are correct that the Solicitor General did not authorize the filing of the petition for a writ of certiorari in the instant case. However, as we have stated in the brief filed on behalf of the United States as amicus curiae (at 2 n.2), it is our view that 28 U.S.C. 518(a) and related statutes do not mandate that the Attorney General and Solicitor General exercise control over those matters—such as the contempt proceedings initiated by the district court in this case—that are internal to the Judicial Branch.

STATEMENT

On November 14, 1985, Raymond J. Patriarca, Jr., the plaintiff in the underlying civil litigation, filed a motion to adjudge respondents in contempt for violating a temporary restraining order barring publication of materials that respondents had obtained from the Federal Bureau of Investigation pursuant to the Freedom of Information Act, 5 U.S.C. 552 (J.A. 223-225). The district court chose not to ask the United States Attorney to pursue the allegations of contempt because the FBI and Department of Justice were parties to the underlying proceeding (Pet. App. A5). In addition, the private attorney for plaintiff Patriarca declined to appear as "prosecutor" of the contempt charges (J.A. 237).[1] Accordingly, the district court entered an order on December 16, 1985, appointing William A. Curran as the "prosecuting attorney",

[1] That arrangement would now be prohibited in any event under this Court's intervening decision in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, No. 85-1329 (May 26, 1987).

with "full authority" to prosecute the motion to adjudge respondents in contempt (J.A. 237-238). On January 6, 1986, in accordance with Fed. R. Crim. P. 42(b), Curran filed an application for an order to show cause why respondents should not be held in contempt (J.A. 3-5), and the court entered a show cause order on the same date (J.A. 31-32). After a hearing, the court held respondents in criminal contempt (Pet. App. A1-A22).

Respondents then appealed to the First Circuit, where Curran, designated as counsel for the "appellee," appeared in support of the judgments of contempt (Pet. App. A27).[2] A panel of the First Circuit reversed the convictions, on the ground that the temporary restraining order was transparently invalid under the First Amendment (Pet. App. A27-A46). The court of appeals, sitting en banc, modified the panel's opinion to make clear that even when a party believes that a judicial order is transparently invalid under the First Amendment, he must make a good faith effort to seek emergency relief from that order rather than simply disobey it (*id.* at A47-A49). However, the en banc court declined to apply that new rule to this case (*id.* at A48-A49).

By letters dated May 15 and June 1, 1987, Robert Parrillo, an associate of the attorney appointed by the district court, inquired whether the Department of Justice would authorize (or interpose an objection

[2] The Department of Justice filed a brief in the court of appeals on behalf of the United States as amicus curiae. That brief addressed only a narrow question of the applicability of the federal wiretap statute to matters arising before its enactment; the brief did not address the question of the validity of the contempt convictions under the First Amendment.

to) the filing of a petition for a writ of certiorari, for which Chief Judge Boyle had authorized the payment of costs. On July 1, 1987, the Solicitor General decided that the Department would not itself file a petition for a writ of certiorari seeking review of the First Circuit's decision. In addition, by telephone conversation and by letter from the Solicitor General dated July 2, 1987, this Office responded to the inquiries from the associate of the attorney appointed by the district court regarding his filing of a certiorari petition. See App., *infra*, 1a-2a. The Solicitor General observed in his letter that this Court had not resolved in its recent decision in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, No. 85-1329 (May 26, 1987), whether the authorization of the Solicitor General is required in order for court-appointed counsel to file a petition for a writ of certiorari in a contempt case. The Solicitor General stated, however, that to the extent such authorization is necessary, he declined to grant it in this case.

Counsel appointed by the district court nevertheless filed a petition for a writ of certiorari, presumably based on his view that the authorization of the Solicitor General was not required. The Court granted that petition on October 5, 1987. The Solicitor General then decided to file a brief on behalf of the United States as amicus curiae, in order to present the views of the Department of Justice and the Executive Branch on the merits of the case.[3] In preparing that brief, we considered the question that the

[3] The Solicitor General's decision not to authorize the filing of a petition for a writ of certiorari to review the judgment of the en banc court of appeals of course did not constitute an endorsement of the disposition by that court, and there accordingly is no inconsistency between the Solicitor General's decision at the certiorari stage and his subsequent decision to file a brief as amicus curiae in support of the petitioner after the Court granted review on the merits. The Solicitor General often files amicus briefs on the merits in criminal cases in which review was granted on the basis of a certiorari petition filed by a State, even though the Solicitor General might have declined to seek review if the same issue had arisen in a federal criminal prosecution or collateral proceeding.

Solicitor General reserved in his July 2, 1987, letter and concluded that the authorization of the Solicitor General was not required in order for counsel appointed by the district court to file the petition for a writ of certiorari. Although the parties did not address that issue in the papers they filed at the certiorari stage, we informed the Court of our conclusion in summary form in footnote 2 of our amicus brief.

ARGUMENT

Respondents base their motion to dismiss on 28 U.S.C. 518(a), which provides that except where the Attorney General in a particular case directs otherwise, "the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court * * * in which the United States is interested." In respondents' view, this statute required the authorization of the Solicitor General before a petition for a writ of certiorari could be filed by William Curran, the attorney who was appointed by the district court to "prosecute" the charges of criminal contempt and who defended the convictions in the court of appeals. Although we tentatively expressed a similar view in our amicus brief in *Young* (at 2 n.1),[4] we have reexamined the question in light

[4] We stated in *Young* that that case "would appear to fall within the scope of 28 U.S.C. 518(a)" (U.S. *Young* Amicus

of this Court's opinion in *Young*. As we stated in our brief as amicus curiae in this case, we have concluded that the authorization of the Solicitor General was not required. We now set forth in more detail the reasons that led us to reach that conclusion.

1. Our analysis begins with the recognition that a person may be punished for contempt of a federal court, in violation of 18 U.S.C. 401, in either of two ways. In our view, only one of those two ways of proceeding is governed by the various statutes—including 28 U.S.C. 518(a)—that vest the Attorney General with control over litigation in which the United States is interested.

First, a criminal prosecution for contempt of court may be commenced in the same manner that a prosecution may be commenced for any other violation of a federal criminal law—that is, by indictment or information, as provided for in Fed. R. Crim. P. 7(a). See, *e.g.*, *United States* v. *Armstrong*, 781 F.2d 700, 703-704 (9th Cir. 1986); *United States* v. *Squartino*, 778 F.2d 734 (11th Cir. 1985); *United States* v. *Williams*, 622 F.2d 830, 837-838 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981); *United States* v. *Morales*, 566 F.2d 402, 404-406 (2d Cir. 1977). The prosecution of a criminal contempt action that is initiated in this manner is the responsibility of the Executive Branch, as an aspect of the President's duty to "take Care that the

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Br. 2 n.1). However, in order to assure that the Court would have the benefit of the arguments in support of the district court's appointment of interested private counsel in the *Young* case, the Solicitor General authorized the court-appointed counsel to appear in this Court on behalf of the respondent (which was identified in the caption as "United States ex rel. Vuitton et Fils").

Laws be faithfully executed." U.S. Const. Art. II, § 3; see *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976). By statute, such a prosecution must be conducted by the United States Attorney or other officer of the Department of Justice, under the supervision of the Attorney General. See 28 U.S.C. 516, 517, 519. In addition, and of particular relevance here, 28 U.S.C. 547 states that "[e]xcept as otherwise provided by law, each United States attorney, within his district, shall—(1) prosecute for all offenses against the United States * * * ." Proceedings in the courts of appeals that arise out of such criminal prosecutions likewise are the responsibility of the Attorney General and other officers of the Department of Justice under 28 U.S.C. 516-519. And if the case reaches this Court, 28 U.S.C. 518(a) requires that, unless the Attorney General directs otherwise, the Attorney General and the Solicitor General shall conduct and argue the case, since it clearly is one "in which the United States is interested" within the meaning of Section 518(a).

Second, unlike other criminal matters, contempt of court may be punished in proceedings that are initiated by the court itself under Fed. R. Crim. P. 42. If the United States Attorney declines the court's request to conduct the prosecution, the court may appoint or designate a private attorney to do so. The Court held in *Young* that the federal district courts "possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt" (slip op. 5). The Court explained that the ability to punish contempts that the United States Attorney declines to prosecute is essential to the

preservation of—and is itself a proper aspect of—the " 'judicial power of the United States' " conferred on the courts by Article III (slip. op. 8, quoting *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)). In the Court's view, the federal courts cannot be completely at the mercy of the Executive Branch in deciding whether contempt proceedings should be initiated, as would be the case if contempt could be punished only in a prosecution initiated by the United States Attorney (*Young*, slip op. 8, 13). Accordingly, the Court concluded that a court's ability to appoint a private attorney to "prosecute" a contempt action "satisfies the need for an independent means of self-protection, without which courts would be 'mere boards of arbitration whose judgments and decrees would be only advisory' " (*id.* at 8, quoting *Gompers*, 221 U.S. at 450).[5]

Thus, under *Young*, when a private attorney is appointed to "prosecute" a contempt action that was initiated by the court pursuant to its inherent authority, that attorney does not exercise "executive Power" within the meaning of Article II of the Constitution, and he therefore is not subject to the control of the President or the Attorney General in the performance of his duties. Instead, the court-appointed attorney merely assists the court in performing an aspect of the "judicial Power" conferred

[5] Consistent with the principle that " 'only "[t]he least possible power adequate to the end proposed" should be used in contempt cases' " (slip op. 12, quoting *United States* v. *Wilson*, 421 U.S. 309, 319 (1975), and *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821)), the Court further held that "a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied" (slip op. 13).

on it by Article III of the Constitution, and the proceedings therefore are subject at all times to the direction and control of the appointing court.[6] In this respect, the role of an attorney appointed by the court differs critically from that of a United States Attorney or other officer of the Department of Justice. The Court recognized this distinction in *Young* when it observed that the fact that contempt has come to be regarded as " 'a crime in the ordinary sense' " for purposes of the application of certain procedural protections (slip op. 11-12, quoting *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968)) "does not mean that any prosecution of contempt must now be considered an execution of the criminal law in which only the executive branch may engage" (slip op. 11).[7]

[6] It is for this reason that in *United States* v. *McKenzie*, 735 F.2d 907 (1984) (discussed at Mot. to Dismiss 11 n.11), the Fifth Circuit correctly held that the private attorneys appointed by the district court to prosecute charges of criminal contempt could not appeal the district court's order dismissing those charges.

[7] Rule 42(b) also provides that the United States Attorney may file an application for an order to show cause why the party should not be held in contempt. That course would be an alternative to filing an indictment or information where the district court refers the matter to the United States Attorney, as required by *Young*.

If the district court enters a show cause order in response to an application filed by the United States Attorney, the latter may assist the court further by prosecuting the contempt charges (to the extent that the assistance of a prosecutor is necessary). Cf. *Young*, slip op. 6. In such a case, the United States Attorney of course remains an officer and representative of the Executive Branch, under the direction of the Attorney General. Compare *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U.S. 34, 36 n.1, 38 (1985). He may decline to participate or cease par-

This difference also is reflected in the relevant laws enacted by the First Congress. Contempt of court was not defined in the first criminal code as one of the ordinary criminal offenses against the United States (Act of Apr. 30, 1790, ch. 9, 1 Stat. 112), to be prosecuted by the United States district attorney pursuant to Section 35 of the Judiciary Act of 1789, ch. 20, 1 Stat. 92. Rather, Section 17 of the Judiciary Act of 1789 conferred directly on the courts themselves the "power * * * to punish * * * all contempts of authority in any cause or hearing before the same" (1 Stat. 83), just as that section conferred on the courts the power to regulate other internal matters by authorizing them to make "all necessary rules for the orderly conducting [of] business" (*ibid.*). Indeed, to this day, the basic contempt statute, 18 U.S.C. 401,[8] confers directly on the courts

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ticipating if his role in the proceedings conflicts with policies of the Department of Justice or specific instructions of the Attorney General. If that occurs, the court presumably may appoint private counsel to pursue the matter. Thus, where contempt proceedings are initiated by the issuance of a show cause order on the application of the United States Attorney under Rule 42(b), the proceedings constitute a cooperative undertaking by the Executive and Judicial Branches.

For similar reasons, respondents err in contending (Mot. to Dismiss 10 n.10) that under our view, if the conviction obtained by the United States Attorney in such a case was reversed on appeal, the district court would have the authority to require the Solicitor General to file a petition for a writ of certiorari to review the judgment of the court of appeals. The Solicitor General, not the district court, would have the authority under 28 U.S.C. 518(a) to decide whether the *Solicitor General* would file a certiorari petition. However, if the Solicitor General decided not to file a petition, it may be that the district court could appoint a private attorney to do so.

[8] 18 U.S.C. 401 is derived from the Act of Mar. 2, 1831, ch. 99, § 1, 4 Stat. 487-488. See U.S. Amicus Br. 10.

the power to punish the specified contempts of their authority.

Early in the Nation's history, contempts governed by Section 17 of the Judiciary Act of 1789 and by what is now 18 U.S.C. 401 were punished by the courts summarily, without the need for the assistance of a specially appointed attorney to present the evidence and otherwise "prosecute" the charges. Over the years, however, with the application to criminal contempt proceedings of most of the procedural protections that a defendant enjoys in other criminal cases (see *Young*, slip op. 11-12), judicially initiated contempt proceedings increasingly came to resemble traditional criminal prosecutions in their form.[9] And because of the practicalities of such non-summary proceedings, it became necessary for the court to appoint an attorney to assist it by assuming the role of a "prosecutor." But this similarity in form should not be permitted to obscure the fact that a private "prosecuting" attorney in a contempt proceeding initiated by the court derives his authority from the court, not from another Branch, and he exercises a species of the judicial power that authorizes a court to punish contempts *unilaterally*. By contrast, the prosecuting attorney in a contempt proceeding initiated by indictment or information acts as the representative of the Executive Branch, which has invoked its independent constitutional and statutory power to file a criminal prosecution.

Against this background, we believe that the statutes, including 28 U.S.C. 518(a), that vest the Attor-

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[9] Indeed, as noted above (see page 6, *supra*), contempt is now on occasion prosecuted by the United States Attorney on the basis of an indictment, in the same manner as other crimes.

ney General with control over the conduct of litigation in which the United States is interested were not intended to apply to contempt proceedings that are initiated unilaterally by a court in the exercise of its Article III power and are "prosecuted" by an attorney appointed by the court. Indeed, the Court in *Young* sustained the power of a court to appoint a private attorney to prosecute charges of criminal contempt notwithstanding that 28 U.S.C. 516 provides that all litigation in which the United States or an officer thereof is a party or "is interested" is "reserved to officers of the Department of Justice, under the direction of the Attorney General," and that 28 U.S.C. 547(1) specifically provides that the United States Attorney shall "prosecute for all offenses against the United States" within his district.[10] The necessary import of *Young* is that despite the broad language of these statutes, they do not apply to criminal contempt proceedings that are initiated by the court under Rule 42(b) and are "prosecuted" under its control.[11]

In our view, it follows that 28 U.S.C. 518(a), which provides that the Attorney General and the Solicitor General shall conduct appeals in this Court "in which the United States is interested," does not

[10] Section 516 and related statutes were not specifically discussed by the Court in *Young*, but the Court's opinion makes clear its understanding that the conduct of criminal prosecutions and other litigation ordinarily is the responsibility of Executive officials. See slip op. 13.

[11] Compare *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261, 1266 (11th Cir.), cert. denied, 469 U.S. 884 (1984); *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 366 F. Supp. 51, 56 (D.D.C. 1973).

apply to appeals arising out of contempt proceedings that were initiated and prosecuted in the lower courts under the control of the district court, rather than the Attorney General. Instead, 28 U.S.C. 518(a), like the other statutes that vest the Attorney General with exclusive control over litigation, applies to cases in which the United States is "interested" by virtue of the constitutional and statutory responsibilities of the Executive Branch—the Branch in which the Attorney General serves. Cf. *ICC* v. *Southern Ry., Co.*, 543 F.2d 534, 536 (5th Cir. 1976) (Section 516 "not only centralizes responsibility for the conduct of public litigation but enables the President, through the Attorney General, to supervise the various policies of the executive branch").[12] This construction is consistent with the decisions of this Court upon which respondents rely in support of their argument that the Solicitor General has authority over the instant case in this Court (see Mot. to Dismiss 5-7), because those decisions concerned litigation in which the United States Attorney had appeared in the lower courts pursuant to the Executive Branch's responsibility under Article II of the Constitution to represent the interests of the United States in litigation against private parties. See *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458 (1868); *United States* v. *Winston*, 170 U.S. 522, 524 (1898); accord *The Gray Jacket*, 72 U.S. (5 Wall.) 370, 371 (1867).[13]

[12] We do not suggest, of course, that the Attorney General and other officers of the Department of Justice are not authorized by 28 U.S.C. 516 and related statutes to represent the officers or interests of the Legislative and Judicial Branches in appropriate circumstances.

[13] By contrast, judges and entities of the Judicial Branch have on occasion appeared in this Court through private

2. Respondents do not discuss the various statutes that vest the Attorney General and United States Attorneys with control over criminal prosecutions and other litigation in the lower courts; nor do they acknowledge that this Court in *Young* sustained the power of a district court to appoint an attorney to prosecute charges of criminal contempt despite the existence of those statutes. Respondents thereby fail to appreciate the obstacle *Young* poses to their argument that the equivalent statute applicable to cases in this Court, 28 U.S.C. 518(a), bars such a court-appointed attorney from petitioning for a writ of certiorari without the approval of the Solicitor General.

Respondents in fact acknowledge (Mot. to Dismiss 9) that "there is, to be sure, a case to be made that, in light of this Court's conclusion in *Young* that it is essential for the judiciary to be empowered to punish disobedience to judicial orders 'without complete dependence on the other branches' (107 S.Ct. at 2131), a district court should be permitted to determine on its own when and whether to seek review by this Court." Respondents' only answer to this telling concession is a policy objection that in a case such as this, the "United States" (which is how the "petitioner" is denominated in this Court) for whom the attorney appointed by the district court purports to speak is only the Judicial Branch—and even then is only the single district judge who appointed the attorney, since the Judicial Branch has no central repository such as the Solicitor General to screen cases and ensure the presentation of a uniform position. This objection is insubstantial.

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counsel, rather than the Attorney General or the Solicitor General, in cases involving their official responsibilities. See, *e.g.*, *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 657 (1978); *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74, 75 (1970); *Will* v. *United States*, 389 U.S. 90, 91 (1967).

Because the contempt proceedings in question were initiated by a single district judge who was not subject to the sort of centralized control that the Attorney General exercises over regular criminal prosecutions, there is nothing anomalous about permitting that single district judge to decide whether to authorize or direct the attorney he appointed to seek review in this Court. In addition, respondents ignore the fact that this Court obviously is in a position to assure centralized control over its own review of appellate decisions in court-initiated contempt cases, through the exercise of its discretionary authority to grant or deny the petition for a writ of certiorari filed by the court-appointed attorney. That role is consistent with the Court's general willingness to exercise its supervisory authority over contempt proceedings in the lower federal courts. See *Young*, slip op. 20, and cases cited. The burden of performing that screening role should not prove to be substantial, because the requirement under *Young* that contempt charges first be referred to the United States Attorney should minimize the number of cases in which the district courts find it necessary to appoint private counsel who might ultimately invoke this Court's certiorari jurisdiction.

Furthermore, respondents' argument for centralized, Executive Branch control over the certiorari decision in a case prosecuted by a court-appointed attorney is in tension with the Court's conclusion in *Young* that a court must be allowed to appoint a private attorney in the first place in order to assure that the courts are not completely at the mercy of the Execu-

tive Branch in vindicating their authority. *Young*, slip op. 8, 13. Vesting the Department of Justice with control over the certiorari decision would be especially anomalous since, after *Young*, contempt actions prosecuted by private attorneys will be ones for which the Department of Justice specifically declined to assume any responsibility when they were referred to the Department at the outset.[14]

It also is significant that, contrary to respondents' suggestion (Mot. to Dismiss 10-11), their construction of 28 U.S.C. 518(a) would not merely require the Solicitor General's authorization for the court-appointed attorney to file a certiorari petition in those cases in which an appellate court reversed the contempt conviction. It also would require the Solicitor General to exercise control over briefs filed by the court-appointed attorney in cases in which the court of appeals affirmed the conviction and the contemnor then sought review in this Court. It therefore would be possible for the Solicitor General to confess error in such a case or otherwise prevent the private attorney from making arguments in support of the conviction that had been accepted by both courts below. The exercise of such control by Executive Branch officials would raise the same concern regarding an "affront to judicial dignity" that respondents concede (Mot. to Dismiss 10-11) was the basis for the Court's conclusion in *Young* that the ability of the federal courts

[14] It is particularly ironic for respondents to advance this argument in a case in which the Solicitor General specifically declined to authorize the filing of a certiorari petition by the court-appointed attorney but the Court nevertheless granted a petition that was filed by the attorney appointed by the district court.

to punish contempts of their authority should not be entirely at the mercy of the Executive Branch.[15]

[15] Respondents base their motion to dismiss solely on the failure of the court-appointed attorney to obtain the authorization of the Solicitor General to file the certiorari petition. They do not assert a lack of "standing" to seek review in this Court, and we do not believe such an assertion should be sustained. Under 28 U.S.C. 1254(1), "*any* party to *any* * * * criminal case" in a court of appeals may file a petition for a writ of certiorari (emphasis added). This language manifests an intention to permit review of all decisions rendered by the courts of appeals. Moreover, the Court has observed that criminal contempt proceedings arising out of civil litigation " 'are between the public and the defendant' " (*Young*, slip op. 16 (quoting *Gompers*, 221 U.S. at 445)). To be sure, where, as here, the proceedings are initiated by the court unilaterally, the United States, as such, is not formally made a "party"—as evidenced by the caption of this case in the lower courts ("*In the Matter of* * * *" (Pet. App. A1, A27)). Nevertheless, the Court in *Young* held that such proceedings constitute a proper exercise of the judicial power under Article III, and the attorney appointed by the district court assures an adversarial presentation of views. Cf. *INS* v. *Chadha*, 462 U.S. 919, 939-940 (1983). In these circumstances, the interests of the appointing court in vindicating its authority would appear to be sufficient to support the conclusion that this Court's jurisdiction has been invoked by a "party" within the meaning of 28 U.S.C. 1254(1).

However, contrary to petitioner's suggestion (Objection to Mot. to Dismiss 2 n.1), we see no reason why the caption of the case in this Court should be changed from what it was in the courts below ("*In the Matter of* * * *"). This Court's Rules do not require the caption to include two opposing parties where the caption below did not do so, and the caption below in this case correctly reflected the unilateral nature of contempt proceedings that are initiated by the court through the issuance of a show cause order. But if the Court nevertheless believes that the case should be captioned in a manner that indicates the existence of opposing interests or "parties," we suggest use of the form "*United States ex rel.* * * *," as

CONCLUSION

The motion to dismiss the writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JANUARY 1988

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in *Young*, to distinguish such cases from those in which a prosecution is initiated by the United States Attorney by indictment or information.

APPENDIX

[SEAL]

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

July 2, 1987

Robert D. Parrillo, Esquire
Hanson, Curran & Parks
1210 Turks Head Building
Providence, Rhode Island 02903-2274

Re: In The Matter Of Application To Adjudge The Providence Journal Company And Its Executive Director, Charles M. Hauser, In Criminal Contempt, No. 85-617

Dear Mr. Parrillo:

Your letters to Douglas Letter of the Civil Division of this Department regarding the above-captioned case have been referred to me for a response.

In its recent decision in *Young* v. *United States ex rel. Vuitton et Fils*, No. 85-1329 (May 26, 1987), the Supreme Court did not resolve the question whether the authorization of the Solicitor General is required in order for private counsel, who has been appointed to present charges of criminal contempt in the district court under Fed. R. Crim. P. 42(b), to file a petition for a writ of certiorari or otherwise appear on behalf of the United States in the Supreme Court. To the extent that such authorization is

necessary, however, I decline to authorize such a filing or appearance in this particular case.

Thank you for your consideration in bringing this matter to our attention.

Sincerely,

/s/ Charles Fried
CHARLES FRIED
Solicitor General

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CLERK

No. 87-65

In The
Supreme Court of the United States
October Term, 1987

UNITED STATES OF AMERICA,

Petitioner,

v.

PROVIDENCE JOURNAL COMPANY AND CHARLES M. HAUSER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. Appellate Exhaustion Is Not Required

Petitioner does not argue that respondents were required to exhaust the appellate process before publishing. That would overstate petitioner's position. Petitioner is sensitive to respondents' first amendment claims. Nevertheless, where respondents failed to make any attempt for lawful redress where opportunities existed for judicial relief, respondents should not be allowed to belatedly argue the merits of the underlying claim in defense of their willful contemptuous conduct.

If respondents had attempted lawful means of review and been met with frustration or delay, then, depending on the specific facts, defense by collaterally attacking the underlying order may have been appropriate. *Walker v. City of Birmingham*, 388 U.S. 307, 318 (1967). Respondents chose not to proceed lawfully. They therefore met with no frustration or delay in the appellate process. They therefore should not be allowed to collaterally attack the temporary restraining order in defense of the criminal contempt proceedings.

II. Cobbledick, Ryan & Maness Distinguished

Respondents cite *Cobbledick v. United States*, 309 U.S. 323 (1940), *United States v. Ryan*, 402 U.S. 530 (1970) and *Maness v. Meyers*, 419 U.S. 449 (1975), in support of their argument that they should be permitted to defend their contemptuous activities by establishing that the temporary restraining order was incorrect. Those cases all dealt with situations where no judicial review of court rulings was available. Because no review was pos-

sible in those cases, one would be permitted to defend criminal contempt charges by attacking the validity of the underlying orders. *Cobbledick, Ryan* and *Maness* do not destroy or even contradict the *Walker, United Mine Workers* and *Howat* holdings[1] that violations of orders issued by courts with jurisdiction, however erroneous such orders may be, are to be obeyed and disobedience may be punished as criminal contempt. As Justice Brennan explained when speaking for the Court in *United States v. Ryan:*

> *Walker v. Birmingham*, 388 U.S. 307 (1967), is not to the contrary. Our holding that the claims there sought to be asserted were not open on review of petitioners' contempt convictions was based upon the availability of review of those claims at an earlier stage.

402 U.S. at 532 n.4. Where avenues for judicial review are available, the usual *Walker, United Mine Workers* and *Howat* rule applies.

This case is different from the *Cobbledick* line of cases. Judicial review was available to the Journal. *See* authorities cited in petitioner's brief at 21; *see also Goldblum v. National Broadcasting Corporation*, 584 F.2d 904 (9th Cir. 1978); *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979) (Circuit Courts of Appeals invoked mandamus for protection of first amendment rights).

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[1]*Walker v. City of Birmingham*, 388 U.S. at 319-21; *United States v. United Mine Workers*, 330 U.S. 258, 290-93 (1947); *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922).

III. Goldblum Distinguished

Respondents cite *Goldblum v. National Broadcasting Company, supra,* as support for the argument that they should not be collaterally barred from raising first amendment issues in defense of the criminal contempt proceedings. The statement in *Goldblum* that a publisher should not be required to take sudden court action while at the same time worrying about whether publication will be treated as a contempt referred to circumstances such as those in that case, 584 F.2d at 907. That case differs from this one in a variety of respects.

Goldblum sought to have the National Broadcasting Corporation (hereinafter "NBC") enjoined from broadcasting a certain film. The complaint was filed slightly more than twenty-four hours before the scheduled NBC telecast was to be aired. In contrast, the Journal, according to Hauser's testimony, felt no need to rush the FBI materials into print. (J.A. 142-43). The Journal requested a postponement of the hearing[2] (J.A. 167); furthermore, the district court was never informed that the Journal felt compelled to publish in spite of or because of the order. This case therefore lacked the urgency which affected the *Goldblum* case.

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[2]The district court had intended to hear the matter within twenty-four hours of the November 13, 1985 chambers conference. The case was continued at the request of the attorneys for the Journal and WJAR-TV—two of the parties which were restrained. This is a fact established by the record and found by the trial court. (J.A. 167, Pet. App. A-3, A-10 - A-11, A-13). It is hardly surprising that Patriarca's attorney had no objection to a continuance. Once the requested restraint was ordered, Patriarca presumably would have been content to agree to an indefinite continuance if the media had asked for it.

In *Goldblum* the district judge issued an order for production of the NBC film so that he could review it for "inaccuracies." 584 F.2d at 906. When the film was not produced, the court imprisoned NBC's counsel until he submitted the film. *Id.* NBC sought expedited review in the court of appeals. *Id.* The sole issue considered by the court of appeals was whether the district court had the power to order production. 584 F.2d at 906 n.1. Of course, petitioner here argues that the district court had authority and its order should have been obeyed. (Pet. Br. 16-32). The Ninth Circuit acted immediately upon NBC's request. *Id.* The Journal sought no judicial review anywhere.

Goldblum's complaint did not advance any theory which would have even the remotest chance of success for securing an injunction. 584 F.2d at 906-07. Patriarca, on the other hand, presented a new and powerful claim for injunctive relief. (J.A. 73, Pet. App. A-18). The information Patriarca sought to have restrained from publication had been obtained in violation of fourth amendment rights.[3] As argued in petitioner's brief at 32-44, the violated temporary restraining order was not transparently invalid.

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[3]The FBI materials had been furnished to the Journal without the FBI's knowledge of the First Circuit's opinion in *Providence Journal Co. v. FBI*, 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980). Those materials apparently were distributed to the Journal by mistake. *See Patriarca v. FBI*, 639 F. Supp. 1193, 1196 (D.R.I. 1986); Declaration of FBI Agent Frank C. Underwood, III, *Patriarca v. FBI*, C.A. No. 85-0707B, record item 55.

IV. There Was no "Judicial Lawlessness"

Respondents' brief at footnote 23 quotes from a law review note. That quotation criticizes the collateral bar rule for "seeming to sanction judicial lawlessness."

It was not the district court which was lawless. The district court was attempting to protect Patriarca's privacy rights; it was also attempting to protect the media's first amendment rights by holding a speedy hearing. The Journal first asked for a postponement of the hearing and then eschewed any and all lawful avenues of review and relief.

Respondents made a private determination that the district court was incorrect. They then published a front page story announcing their decision to disregard the court's order and at the same time published the illegally gathered materials in violation of the temporary restraining order. (J.A. 39). The only lawlessness was that of respondents.

V. There Is No Due Process Problem

Respondents argue for the first time that they cannot be punished for criminal contempt consistent with due process of law. (Respondents' Br. 41-43). Respondents argue that one cannot be prosecuted for acts that he did not have fair notice were criminal. (Respondents' Br. 41). They argue that when one engages in conduct " 'in justified reliance upon prior decisions,' " he cannot, consistent with due process of law, be punished for such conduct. *Id.* Respondents then argue that *United States v. Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), *cert. denied*, 449 U.S.

1021 (1980), should justify their violation of the temporary restraining order.[4]

This argument should fail for two reasons. First, *Arthur Andersen* does not control. Also, even if it did, respondents make no assertion that they relied upon *Arthur Andersen* when they violated the order or were even aware of that opinion until after they were held in criminal contempt.

Arthur Andersen does not expand the law beyond *Cobbledick* or *Ryan*. It is not a general holding that the collateral bar rule no longer applies in the First Circuit. *See Fernos-Lopez v. United States District Court for the District of Puerto Rico*, 599 F.2d 1087, 1091 (1st Cir. 1979), *cert. denied*, 444 U.S. 931 (1979), *rehearing denied*, 444 U.S. 1103 (1980). The statement in *Arthur Andersen* that a party may obtain appellate review of an order enforcing an Internal Revenue Service summons by litigating the merits of the summons as a defense to a contempt citation is simply in line with the policy set forth in *Cobbledick* and *Ryan*.[5] As discussed above, those cases are not contrary to the collateral bar rule. *United States v. Ryan*, 402 U.S. at 532 n.4.

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[4]As respondents explain (Respondents' Br. 43 n.37), *Arthur Andersen* was urged by respondents in the First Circuit. There was no reference by them at that time, however, to any due process argument.

[5]In *Arthur Andersen* the district court ordered Andersen to comply with the IRS summons. 623 F.2d at 722. Motions for a stay were denied by the district court and the court of appeals. *Id.* Although the district court's enforcement order was a final, appealable order, 623 F.2d at 722 n.5, Andersen complied with it. The issue therefore was rendered moot.

Respondents make no claim that they acted in reliance on what they believe *Arthur Andersen* establishes. The Journal submitted a lengthy memorandum to the district court setting forth why they should not be held in criminal contempt.[6] Many cases were cited in that memorandum but *Arthur Andersen* was not among them. Respondents have not been deprived of due process of law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 12, 1988

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[6]For the convenience of the Court, a copy of the Journal's memorandum has been lodged by petitioner with the Clerk of the Court.

Supreme Court, U.S.
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No. 87-65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,
Petitioner,

v.

PROVIDENCE JOURNAL COMPANY AND
CHARLES M. HAUSER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF *AMICI CURIAE*, THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION, IN SUPPORT OF PETITIONER (FILED WITH WRITTEN CONSENT)

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether, in a case raising an unprecedented conflict between the First and Fourth Amendments, a federal court has the authority to enter a temporary restraining order enjoining a newspaper from publishing illegally obtained information in order to preserve the status quo and thereby prevent publication from mooting the controversy.

2. Whether a newspaper may be held in criminal contempt for willfully violating a court order, temporarily prohibiting it from publishing illegally gathered information, that is later declared to be invalid.

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BRIEF OF *AMICI CURIAE*, THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION, IN SUPPORT OF PETITIONER (FILED WITH WRITTEN CONSENT)

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C. WLF engages in litigation, administrative proceedings, and policy advocacy in support of the constitutional values upon which America was founded.

The Allied Educational Foundation ("AEF"), established in 1964, is a non-profit, charitable and educational foundation based in Englewood, New Jersey. It is devoted to the pursuit of knowledge, education, and the broad public interest.

Both the Washington Legal Foundation and the Allied Educational Foundation are committed to the preservation of a strong and independent judiciary. In line with that objective, each organization has devoted a substantial portion of its resources to legal activities designed to maintain the integrity of the courts. For example, WLF has participated in cases supporting the constitutionality of the Judicial Conduct and Disability Act of 1980. *Hastings v. Judicial Conference of the United States*, 829 F.2d 91 (D.C. Cir. 1987). It has also filed complaints under the Judicial Conduct Act seeking sanctions for conduct prejudicial to the effective administration of the courts.

WLF's and AEF's interest in preserving an effective judiciary are further reflected in their publications on this subject. Over the last five years WLF has continuously published its *Court Watch Manual: A Citizen's Guide to Judicial Accountability.* Designed and distributed for grass-roots use, this 111-page *Manual* describes the criminal justice system, the procedures for state and federal judicial appointments, and the way in which the average citizen can actively participate in the administration of justice. WLF and AEF have together also published *Capital Punishment 1986: The Last Lines Of Defense*, a 35-page report examining the judicial administration of capital punishment in recent years.

WLF and AEF are additionally concerned about preserving the effective administration of justice in the face of exaggerated constitutional claims advanced under the banner of the First Amendment. Thus, for example, AEF and WLF have filed joint *amici curiae* briefs with

this Court in cases involving First Amendment challenges to the government's power to regulate foreign propaganda and exclude hostile aliens on national security grounds: *Meese v. Keene*, 55 U.S.L.W. 4586 (1987) and *Reagan v. Abourezk*, 56 U.S.L.W. 4001 (October 19, 1987). *Amici*'s purpose in participating in those cases, as here, stems from a desire to ensure that overly broad constructions of the First Amendment are not used to restrict other liberties no less precious to the preservation of our democratic process.

Amici's particular interest in this case derives from a concern that the institution of the judiciary may be irreparably weakened unless the First Circuit's holding is reversed and the finding of criminal contempt against the Providence Journal and its editor (hereinafter referred to collectively as either "the Journal" or "respondents") is reinstated. The Journal's conduct in disobeying a lawfully issued temporary restraining order evidenced a total lack of respect for the judicial process. However much courts are charged to safeguard core First Amendment values, they plainly also have a paramount duty to (a) protect the orderly administration of the judicial process and (b) preserve their own authority. Fidelity to the First Amendment simply does not compel a federal court to rush to make constitutional adjudications or to meekly accept deliberate violations of its orders.

In *amici*'s view, the deliberate refusal of the Journal to obey the district court's order strikes directly at the ability of all courts—including this one—to faithfully discharge their duties and responsibilities. We therefore appear here in order to have vindicated the time-honored rule that court orders, even those subsequently declared unconstitutional, must nevertheless be obeyed until set aside or modified on appeal. To argue as respondents do that a newspaper may willfully and deliberately disregard a binding court order with impunity—an order

entered to preserve a litigant's right to secure meaningful judicial review—is to mock the very idea of justice. It is to replace the rule of law with the rule of private fiat.

Freedom of the press is not an absolute right. Its proper scope depends upon the context in which it is asserted. Here, a complaint was filed against the Journal raising serious statutory and constitutional claims; a TRO was issued after a preliminary hearing to preserve the status quo. Rather than comply with the order or, at the very least, manifest some degree or respect for the law by filing a motion to vacate, the Journal simply ignored it. In so doing, it thereby allowed its publication of the enjoined material to effectively moot the controversy that was pending before the trial court.

Of course, the Journal now seeks to justify its willful violation of the law by labeling the court order a "prior restraint." Yet, even admitting that certain modest First Amendment interests were at stake, it simply will not do to "solve" this case through recourse to short-hand phrases. Although freedom of the press is precious, even "the most prized liberties presuppose an independent judiciary through which these liberties may be . . . vindicated." *United States v. United Mine Workers*, 330 U.S. 258, 311 (1947) (Frankfurter, J., concurring).

Respondents and their supporting press *amici* have come before this Court to stress the importance of the First Amendment over all other competing interests. By articulating why the public interest requires this Court to preserve the ability of federal judges to decide cases and to punish for willful contempt, *amici* hope to redress this argumentative imbalance and thereby assist the Court in reaching a more informed judgment. *Amici's* brief is filed with the written consent of all parties, pursuant to Supreme Court Rule 36.1.

STATEMENT OF THE CASE

Amici adopt by reference the complete statement of the case contained in petitioner's brief on the merits. However in order that the legal arguments advanced in this brief may be more fully understood, *amici* offer the following factual summary of events.

On Friday, November 8, 1985, Raymond J. Patriarca ("Patriarca") brought an action against the Federal Bureau of Investigation ("the FBI"), the Providence Journal Company ("the Journal"), *et alia*, in federal district court for the district of Rhode Island. Patriarca's complaint was based upon the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510-21, and the Fourth Amendment to the United States Constitution. It alleged that the FBI had wrongfully released 20-year-old logs and memoranda to the Journal which (a) implicated Patriarca's privacy rights and (b) had previously been held to have been illegally gathered in violation of the Fourth Amendment. *See Providence Journal Co. v. FBI*, 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980). In a Motion for Temporary Injunctive Relief filed contemporaneously with the complaint, Patriarca petitioned the district court to issue an order enjoining the Journal from publishing any articles relating to the logs and memoranda at issue in his complaint.

On Tuesday, November 12, 1985, Patriarca's summons, complaint, and motion were served on the Journal. The next day, the district court met in chambers with counsel for all parties to consider Patriarca's request for a temporary restraining order. After hearing argument from counsel, the court granted the TRO. In so acting, the court expressed concern "that unless the status quo was maintained for a time until [it] could sort out the various contentions, there would be no status to preserve,

and publication would make the matter moot." *Patriarca v. FBI*, 630 F. Supp. 993, 998 (D.R.I. 1986). In other words, the court wished to have an unhurried opportunity to consider the serious legal issues that had been presented to it and thereby preserve Patriarca's right to have effective judicial review of his claims.

After issuing the temporary restraining order, the court offered to hear counsel in open court the following morning, Thursday, November 14, 1985, on whether its restraining order ought to be lifted. However, counsel for the Journal advised the court that the newspaper needed until Friday, November 15, 1985, in order to proceed with the case. Accordingly, a hearing was set for that date. At no point during the November 13th chambers conference did counsel for the Journal state or suggest that they would publish in defiance of the court's temporary restraining order.

However, on Thursday, November 14, 1985—the day after the district court had granted the Journal's request for an additional day to respond to Patriarca's constitutional claims and while the court's temporary restraining order was still in full force and effect—the Journal published an article concerning Patriarca based on the illegally gathered information the FBI had disseminated to it. The Journal article on Patriarca, published November 14, 1985, appeared on the paper's front page. The banner headline above the article stated, "Court, Journal Clash Over Use Of Tapes." The sub-heading proclaimed, "Despite ruling on Patriarca suit newspaper decides to print excerpts from FBI recordings." In the view of the First Circuit, "From all appearances, the Journal used the presence of the court order [restraining publication] to bolster the importance of the Patriarca story." *In The Matter Of Application To Adjudge The Providence Journal Company And Its Executive Editor, Charles M. Hauser, In Criminal Contempt*, 820 F.2d 1342, 1353 n.75 (1st Cir. 1986).

The Journal's rationale for violating the court's order, as stated in its November 14 article, was "the Constitution's guarantee of a free press." The Journal has not contested or denied the fact that its action constituted a willful and deliberate violation of the court's order.

Post-publication, Patriarca filed a motion to judge the Journal in contempt. When he declined to prosecute the criminal contempt motion, the district court invoked Fed. R. Crim. P. 42(b) and appointed a special prosecutor. Following a hearing, the district court found the Journal to be guilty of criminal contempt. The court subsequently imposed an 18-month jail sentence on the Journal's publisher, Charles M. Hauser, which was later suspended and reduced to 200 hours of community service. The Journal was fined $100,000.

On appeal, the U.S. Court of Appeals for the First Circuit reversed the criminal contempt conviction. While recognizing that "court orders are accorded a special status in American jurisprudence" and that, in order to protect the rightful power of the courts, "there is a heavy presumption in favor of [their] validity," 820 F.2d at 1347, the appeals court nevertheless held that the district court's order had been "transparently invalid" and constituted a "presumptively invalid prior restraint." *Id.* at 1353.

A suggestion for rehearing en banc was granted and a three paragraph *per curiam* opinion later issued in which the *en banc* court affirmed the panel's opinion modifying it in minor details only. 820 F.2d 1354-1355.

SUMMARY OF ARGUMENT

1. The district court properly issued a temporary restraining order. At the time the instant case arose the trial court was presented with serious constitutional questions involving, *inter alia*, a newspaper's right of access to and potential publication of illegally gathered information and a private citizen's right of privacy. Nothing in the First Amendment to the Constitution forbids a trial court from issuing a TRO in order to (a) preserve the status quo; (b) prevent irreparable harm from occurring to a private litigant; (c) preserve the court's right to adjudicate the controversy before it; and (d) avoid a rush to constitutional adjudication.

2. Respondents' claim that they cannot be punished for willfully disobeying a lawfully issued court order is invalid. The federal district court was entitled to preserve the status quo pending the court's resolution of the jurisdictional issues before it. Further, the court had subject matter jurisdiction and personal jurisdiction over all parties to the dispute. Hence, the order it issued was entitled to be obeyed even though it was subsequently held to be invalid on appeal.

3. Respondents' prior restraint theory of this case is incompatible with previous holdings of this Court establishing that the willful refusal of a party to obey a binding court order is punishable as criminal contempt. The talismanic invocation of the phrase "prior restraint" does nothing to alter respondents' contumacious conduct. Moreover, it does not in any way mitigate respondents' open defiance of the authority of the trial court to argue that press freedoms were at stake. To allow the authority of a federal court to be flouted in the name of the First Amendment is to reject the requirements of the judicial process and the rule of law upon which all liberties, including those guaranteed by the First Amendment, depend.

ARGUMENT

I. THE DISTRICT COURT PROPERLY ISSUED A TEMPORARY RESTRAINING ORDER TO PRESERVE THE STATUS QUO

This appeal raises the important question of whether the First Amendment forbids a federal district court from issuing an order temporarily restraining a newspaper from publishing material in order to have adequate time to review and assess complex constitutional issues. As a practical matter, it poses the equally serious question of whether the federal judiciary is powerless to deal with willful contempt of its orders by the press whenever a colorable First Amendment claim may be advanced as a defense.

A century ago it may have approached hyperbole for Warren and Brandeis to suggest that the press was everywhere overstepping the bounds of propriety and needed to be restrained. Warren and Brandeis, "The Right to Privacy," 4 *Harv. L. Rev.* 193 (1890). Today, however, at a time when the press deems it axiomatic that it may publish whatever it pleases, whenever it pleases, such a suggestion is no longer easily dismissed.

Respondents, the Providence (Rhode Island) Journal and its editor, Charles M. Hauser, are vivid proof of this. Having been sued under a general invasion of privacy theory, they appeared in court to argue against the issuance of a TRO intended to preserve the court's ability to hear the case. When respondents lost this argument and a binding court order temporarily blocking publication issued, they did not make any effort to have the court's order dissolved or modified. They did not seek to notify the court of their intended course of action. They did not wait 48 hours until the hearing date on which counsel for the paper had already agreed to argue their case in full. Instead, respondents unilaterally arrogated to themselves the right to terminate the lawsuit by publishing the material the court had ordered them not to.

Given these circumstances, the district court was justified in having the Journal prosecuted for criminal contempt. "Although its statements professed respect for the Judge, its words and actions were those of utter defiance of the constitutional system of justice." 630 F. Supp. at 1000. The court properly concluded that it had lawful authority to resolve the controversy Patriarca had placed before it and that the restraining order in question—duly entered after a chambers conference with counsel for all parties in attendance—was equally lawful and entitled to obedience. Accordingly, the trial court found the Journal in contempt and reaffirmed the well established principle that an injunction duly issuing out of a court having subject matter and personal jurisdiction must be obeyed until reversed either by itself or by a higher court on appeal.

But respondents contend that this principle no longer holds true if a contemplated court injunction affects press publication. They argue that the First Amendment somehow limits the ability of a federal judge to control the conduct of parties to a lawsuit in matters affecting the substantive issues of the suit—matters that bear directly upon the court's inherent ability to pass any ultimate judgment on those issues. Vigorously disavowing any disrespect for the judicial system, respondents successfully argued below for the adoption of a new rule of law that would allow any party to a lawsuit to ignore a "transparently invalid" order affecting speech.

But this argument fails (among other reasons advanced below) because it overlooks competing constitutional values of equal or greater significance. As this Court recognized in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911), and has oftentimes reaffirmed in subsequent decisions, *e.g.*, *United States v. United Mine Workers*, 330 U.S. 258, 290 n.56 (1947):

> If a party can make himself a judge of the validity of orders which have been issued, and by his own act

> of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery.

Moreover, respondents' First Amendment analysis of the district court's action is flawed in several respects. The authority of a federal court to punish for contempt in situations when press publication directly tends to prevent the proper discharge of the court's judicial duties has not normally been reviewed under this Court's prior restraint line of precedent. *See, e.g., Nebraska Press Association v. Stuart*, 427 U.S. 539, 557 n.5 (1976) (contempt proceedings involving out-of-court publications relating to a pending case raise "problems *substantially different* from those raised by prior restraint [cases]" (emphasis added)). Further, the authority of federal courts to punish for contempt in circumstances analogous to those *sub judice* has been repeatedly vindicated by this Court. *See Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911); *Howat v. Kansas*, 258 U.S. 181 (1922); *United States v. United Mine Workers*, 330 U.S. 258 (1947) and *Walker v. City of Birmingham*, 388 U.S. 316 (1967).

Even if modest First Amendment values may be implicated here,[1] respondents seek to give far broader scope to their liberty to publish under these circumstances than this Court has ever recognized. Although freedom to publish should be given a wide berth, publication may at times be subordinated to "the essential requirement of fair and orderly administration of justice." *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946). In this instance, a finding of criminal contempt was appropriate in light of the fact that the Journal's publication directly inter-

[1] That the publication in question involved speech of a modest value is clear from the fact that it: (a) had been illegally gathered (b) was over twenty years old and (c) concerned private, non-political speech.

fered with the trial court's ability to discharge its judicial duties.

> The power of a court to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration, whose judgments and decisions would be only advisory.

Gompers v. Buck's Stove & Range Co., 221 U.S. at 450.

In the end, respondents' arguments constitute little more than a contrived constitutional claim of special privilege which would leave the federal judiciary powerless to prevent press publications no matter what the magnitude of the competing interests at stake.[2] The district court properly rejected this approach and in so doing aptly summarized the principles which should govern the disposition of this case:

> The judicial power of the United States is vested in the courts by Article III of the Constitution. The courts have the right to determine controversies between litigants. *Muskrat v. United States*, 219 U.S. 346, 361, . . . (1911); *General Investment Co. v. New York Central Co.*, 271 U.S. 228, 230, . . . (1926). The Court has, as an ancillary power, the authority to punish for contempt. *Michaelson v. United States*, 266 U.S. 42, 65-66, . . . (1924).
>
> In this instance the Journal seized the judicial power to itself. This is a serious controversy involving prior court determinations and conflicts between constitutional principles. Although the order might ultimately be held to be invalid, there is enough substance to it to expect law abiding persons to respect it at least briefly. The Journal showed no respect whatsoever, and, therefore, it must be found in contempt of the order entered November 13, 1985.

Patriarca v. FBI, 630 F.Supp. at 1004.

[2] For example, one might easily imagine another Pentagon Papers case arising in which claims of national security are again pitted against the press' right to publish. In the Pentagon Papers case, the *New York Times* abided by a court order restraining publication. Moreover, there seemed to be a general agreement among the members of this Court that even though the court's order was defective, it had been proper for the *Times* to obey it. *See generally, New York Times Co. v. United States*, 403 U.S. 713 (1971). However, these assumptions would be cast into grave doubt were the Court to find in favor of respondents.

A. Weighty Issues Of Statutory And Constitutional Law Were Presented To The Court For Resolution

Respondents have argued below and may be expected to argue here that the jurisdictional claims advanced by the plaintiff in his lawsuit against the Journal were frivolous. Consequently they contend that the district court lacked subject matter jurisdiction over this dispute—a state of affairs which would effectively preclude any possible contempt conviction for disobeying the court's restraining order.

However unless this Court is prepared to ignore binding precedent and contemporary realities about the severe time constraints facing federal judges, it must reject respondents' argument. Respondents' suggestion as to the patent frivolity of Patriarca's claims can hardly be taken seriously in light of the fact that when first made, counsel for the Journal requested additional time to be able to respond adequately to them. Moreover, at no point prior to the contempt proceeding being initiated did counsel for the Journal present to the district court any authority relevant to the jurisdictional issue—a fact hardly indicative of an obvious lack of jurisdiction for Patriarca's claims. *Patriarca v. FBI*, 630 F. Supp. at 999; 1002.

More to the point, the jurisdictional argument proposed by respondents rests upon a fundamental misconception of the judicial function in dispute resolution. Where, as here, a lawsuit is filed and a temporary re-

straining order is sought, a court is necessarily forced to render an immediate ruling. At such a time, and as the district court correctly observed, "no court is charged with instantaneous knowledge of all applicable precedent." *Id.* at 999. For this reason, the proper course of action for the court to pursue was to avoid a rush to constitutional adjudication by granting the requested order, thereby preserving the status quo. In this way, the court properly allowed itself the opportunity for unhurried reflection upon the weighty issues presented to it.

It is instructive to note that this Court has routinely sanctioned such an approach even if it is subsequently determined that the court lacked jurisdiction of the case. *United States v. United Mine Workers*, 330 U.S. at 291 (1947). The rationale underlying this approach has been most clearly articulated by Justice Frankfurter in his concurrence in the *United Mine Workers* case:

> [N]o type of controversy is more peculiarly fit for judicial determination than a controversy that calls into question the power of a court to decide. Controversies over "jurisdiction" are apt to raise difficult technical problems. They usually involve judicial presuppositions, textual doubts, confused legislative history, and like factors hardly fit for final determination by the self-interest of a party.

Id. at 309.

All of these considerations figured prominently in the trial court's ruling. Moreover, the district court had the inherent authority, from the necessity of Patriarca's complaint being filed with it, to rule on the jurisdictional issues and to enter any orders it deemed proper in order to preserve the lawsuit for its subsequent resolution.

Far more significantly, Patriarca's claims to jurisdiction were not frivolous. Patriarca asserted three such bases: the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552; the Omnibus Crime Control and Safe

Streets Act of 1968, 18 U.S.C. § 2510, *et seq.* ("Title III"); and the Fourth Amendment to the U.S. Constitution.

Admittedly, Patriarca's claim under FOIA to restrain the disclosure of information by the Journal was questionable. In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), this Court rejected arguments that such a "reverse FOIA" action might be founded on the FOIA. However, the Court did resolve that a reverse FOIA action such as Patriarca sought to achieve might properly be based on Section 10(a) of the Administrative Procedure Act, 5 U.S.C. Sec. 702 (1976). *Id.* at 317. Thus acting pursuant to its inherent equitable powers, the trial court may have entertained such a claim or allowed Patriarca to amend his complaint to assert a more proper cause of action.

As for Patriarca's Title III claims, the First Circuit had already ruled in *Providence Journal Co. v. FBI*, 602 F.2d 1010 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980), that the disclosure of the information the Journal possessed would violate Title III as a disclosure of unlawfully obtained information. Thus this claim was not patently frivolous.

As for Patriarca's Fourth Amendment claim, this duplicated the view propounded by a federal court that had earlier considered this question. In *Providence Journal v. FBI*, 460 F.Supp. 762 (D.R.I. 1978), that court stated:

> Because the fourth amendment protects persons against intrusion on private places and conversations, even those carried on in the most public of phone booths, it surely follows that the fourth amendment has something to say about the reasonableness of the uses to which the state puts the seized information. Forbidding the state to wiretap a conversation, but providing no remedy when it not only wiretaps but discloses the contents of the conversation to the pub-

> lic would be to recognize a constitutional right without a concomitant remedy. For if an initial intrusion invades privacy, the public disclosure of what is seized destroys it altogether. Moreover, without this penumbral protection for the seized information, the core fourth amendment right to be free of the initial intrusion would be less secure.

460 F. Supp. at 771.

In light of the fact that a federal court had earlier voiced support for the type of Fourth Amendment privacy claim that Patriarca was advancing, it is clear that invoking the district court's jurisdiction under this theory was not patently frivolous.

B. Press Publication Would Have Mooted The Controversy And Divested The Plaintiff Of His Right To Judicial Review

It is an elementary principle of our system of justice that federal courts have broad and inherent power to prevent abuse and to do substantial justice to parties who come before it seeking judicial redress. *RFC v. Providence S. A. Group*, 311 U.S. 579, 582-583 (1941). *See generally*, 1 Moore's Federal Practice, ¶ 0.60 [6] and cases cited therein. One of these inherent powers is the ability to issue injunctions to hold matters in status quo pending a determination of such issues as whether jurisdiction properly lies before the court.

In the instant case, Patriarca sought injunctive relief to prevent the disclosure of illegally obtained information violative of his privacy rights. In considering Patriarca's request for a restraining order, the trial judge first met with counsel for all parties before contending that serious legal issues were presented. In issuing the TRO, the court concluded that the Journal would not suffer irreparable harm. It further correctly recognized that failure to grant the injunctive relief would entirely destroy

Patriarca's right to secure meaningful judicial review of his privacy claims. Stated differently, unless the status quo were maintained via the court's order, publication by the Journal would terminate the lawsuit.

A second valid reason for issuing the injunction was to avoid a rush to constitutional adjudication. The lower court needed an opportunity to consider and react to the novel claims that were presented to it. In the apt words of the trial judge, "Courts simply cannot function as 'drive in' businesses if the quality of the judicial product is to be worthwhile." *Patriarca v. FBI*, 630 at 999.

Unless this Court is prepared to find that it is clearly erroneous for a federal court to issue an injunction to preserve the status quo so that: (a) a litigant's right to secure effective judicial review of his claims is preserved and (b) the court may have adequate time to consider novel constitutional issues, it must reaffirm the district court's decision to issue the temporary restraining order and its subsequent finding of contempt.

II. THE DISTRICT COURT PROPERLY HELD THAT WILLFUL VIOLATION OF ITS TEMPORARY RESTRAINING ORDER WAS PUNISHABLE BY CRIMINAL CONTEMPT

Since the district court properly had subject matter and personal jurisdiction over the parties to this controversy, it makes no difference that its order affected Journal *qua* a newspaper asserting a First Amendment right to publish. It is clear that the First Amendment has never been interpreted to invalidate every burdening of the press that may result from governmental actions designed to secure the fair administration of justice. *See e.g., Branzburg v. Hayes*, 408 U.S. 667, 681-685 (1972) and cases cited therein. Nor does the First Amendment grant the press special rights in excess of those afforded to the public generally. *Id.* at 684; 704. If the members

of one group may be held in criminal contempt for willful violation of a court order, so may members of the other.

For purposes of legal analysis, the only relevant inquiry is whether the court issuing the orders: (a) had subject matter and personal jurisdiction over the controversy; (b) allowed adequate and effective remedies for orderly review of the ruling; and (c) did not require an irretrievable surrender of a party's constitutional rights. *Walker v. City of Birmingham*, 388 U.S. 307, 319 (1967). If these three conditions obtained, then the contempt proceeding must be adjudged valid *even if* the underlying order is set aside on appeal as unconstitutional. *United States v. United Mine Workers*, 330 U.S. 258, 294 (1947). This point is of longstanding origin and is firmly established in the Court's precedents. *See e.g., Worden v. Searls*, 121 U.S. 14 (1897).

That the district court had subject matter and personal jurisdiction over the controversy has been discussed above and will not be repeated here. As for the availability of adequate review of the court's order, the record offers no support for any conceivable claim of delay or obstruction on the part of the trial judge. On the contrary, the plain fact is that the Journal deliberately decided to disobey the court's order within hours of its issuance. It never had the slightest intention of testing the restraining order's validity through established judicial processes.

Lastly, the surrender of First Amendment freedoms that the Journal would have been compelled to undergo had it obeyed the court's order was minimal and "retrievable." Indeed, had counsel for the Journal not requested to extend the original date that had been contemplated for hearing arguments on the validity of the court's injunction, it may have been possible to have had the court's order vacated in time to publish on the very same day as the Journal actually did.

Three options were available to the Journal below. It could have complied with the district court's order and thereby accepted the temporary restraint that was imposed on it for 48 hours until the scheduled hearing could occur. Secondly, it could have immediately asked the trial judge to reconsider his order or appealed the order directly. By choosing this route, the most it would have lost in obeying the order was one day. Lastly, the Journal was free to publish in the face of the order—but, as indicated, at the price of forfeiting its right to object to the constitutionality of the order. "One who defies the public authority and willfully refuses his obedience, does so at his peril." *United States v. United Mine Workers*, 330 U.S. at 302. The Journal took such a calculated risk and should not now be heard to complain because it is being punished as a result.

A. Prosecution For Criminal Contempt In This Context Does Not Constitute An Unconstitutional Prior Restraint On Speech

Throughout the course of this litigation, respondents have cloaked their arguments in the attractive and familiar garb of the First Amendment. They routinely begin with the unassailable proposition, first articulated by the Court in *Near v. Minnesota*, 283 U.S. 697, 713 (1931), that one of the main purposes of the First Amendment is "to prevent previous restraints upon publication." Subtly and swiftly, they then shift their arguments to the astonishing proposition that court orders enjoining publication in the interests of preserving the status quo in a pending case in some way epitomize all the evils of prior restraint that this Court has inveighed against over the past half century.

Thus respondents display an uncritical tendency to treat this case as if it were on all fours with various prior restraint cases—which it patently is not. At the same time they gloss over the relevant case law uphold-

ing the power of judges to issue such injunctions and to punish by contempt out-of-court activities tending to obstruct the orderly administration of justice. *E.g.*, *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

But no matter how much respondents may lecture this Court on the evils of prior restraints, this case is not so easily resolved as that:

> [T]he phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of close analysis and critical judgment in applying the thought behind the phrase [necessitates] . . . 'a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.'

Kingsley Books v. Brown, 354 U.S. 436, 441-442 (1957), *quoting* Freund, "The Supreme Court and Civil Liberties," 4 *Vand. L. Rev.* 533, 539 (1951). In contrast to respondents' farfetched analogies, "a pragmatic assessment" of the district court's order, considered in the context of the germane jurisprudence, leads inevitably to the conclusion that no First Amendment guarantees were violated.

It is important to recall at this point that judicial injunctions bear little resemblance to the types of administrative preclearance or licensing schemes that this Court has normally castigated as prior restraints. *E.g.*, *Freedman v. Maryland*, 380 U.S. 476 (1957); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). Indeed, in certain decisions this Court has sustained criminal contempt sentences against claims that the underlying judicial injunction abridged the First Amendment without ever once invoking the prior restraint doctrine. *Walker v. City of Birmingham*, 388 U.S. 307 (1967). Such decisions are consistent with the view held by a longstanding majority of this Court that because court-

ordered injunctions involve the authority of the courts they should not automatically be classified as prior restraints and thereby receive special disfavored treatment under the First Amendment. *E.g.*, *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 390 (1973); *Nebraska Press Associaiton v. Stuart*, 427 U.S. at 557 n.5.

Court-ordered injunctions also provide litigants with a panoply of rights and procedural protections absent from typical licensing schemes. In this instance, for example, the parameters of the injunction were narrowly drawn and quite specific. They related exclusively to preserving the status quo so that the underlying lawsuit would remain ripe for judicial resolution. Moreover, counsel for the Journal appeared in the court's chambers and were heard in argument against the grant of injunction. In addition, there was no less restrictive alternatives for the court to pursue if it wished to preserve judicial review over Patriarca's claims.

Focusing on the particularities of the speech affected by the court's injunction is also dispositive of respondents' prior restraint argument. Unlike most prior restraint cases, the speech at issue did not "fall[] upon the communication of news and commentary on current events." *Nebraska Press Association v. Stuart*, 427 U.S. at 559. On the contrary, the Journal's story was based upon information that was not "news" in any meaningful sense of the word; it involved events that occurred over twenty years ago. Nor did the story concern political speech, which this Court has held to be subject to the most vigorous protection against restraints. *Near v. Minnesota*, 283 U.S. 697, 699 (1931). Rather, it was based upon illegal wiretaps that were previously determined by a court of law to have constituted an invasion of privacy and concerned such trivial matters as Patriarca's "difficulties in school and with his friends both male and female." *Patriarca v. FBI*, 630 F. Supp. at 995.

The Court should also pause to consider how costly in terms of the First Amendment the impact of the delay in publication created by adherence to the court's injunction would have been. The district court was prepared to lift its TRO on the very next day following its issuance. It was only acting in accordance with the wishes of the Journal's counsel that the injunction was placed in effect for a period of 48 hours. More to the point, time was not of the essence for a story that involved two-decade's old events.

In light of the reduced constitutional value of speech that was affected (i.e., it did not involve matters of public concern), and the fact that, had the injunction been obeyed, its effect on the story's impact would have been inconsequential, it must be seen that the district court acted properly.

Even if this Court concludes that the district court's injunction did function as a prior restraint, its analysis should not automatically end with a finding of unconstitutionality.

> This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed. See *New York Times Co. v. United States*, 403 U.S. 713 (1971) . . . ; *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) . . . ; *Near v. Minnesota*, 283 U.S. 697 (1931).

Nebraska Press Association v. Stuart, 427 U.S. at 570. In that event, the Court must then determine whether the power of federal courts to issue injunctive orders in order to preserve the independence of the judiciary constitutes one of those valued interests the "protection of which may in some instances justify limitations on First Amendment freedoms." *Elrod v. Burns*, 427 U.S. 347, 368 (1976). Given that this Court's past rulings have consistently recognized the compelling nature of this interest, there can be little doubt that in resolving the conflict between the district court's injunction and the Journal's publication rights, the former must be found to be more important. "[R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give meaning to constitutional freedoms." *Walker v. City of Birmingham*, 388 U.S. at 321.

B. The First Circuit's Holding Is Insupportable And Will Serve To Undermine The Orderly Administration Of Justice

The First Circuit's reversal of the criminal contempt sentences imposed by the district court demonstrates a profound number of misconceptions. These relate first of all to the perceived burden on First Amendment rights effectuated by the lower court's order restraining publication and, secondly, to the necessarily wide discretion afforded trial judges in attempting to administer justice fairly among litigants who seek judicial redress.

As demonstrated above, the First Amendment interests advanced by respondents as grounds for disobeying the court's order are relatively insubstantial. Viewed fairly, they simply fail to support the claim that immediate publication was necessary or that the modest delay created by the district court's injunction constituted an intolerable abridgment of the Journal's press freedoms. Curiously enough, although the First Circuit's opinion repeatedly acknowledges that obeying court orders is the "sine qua non of orderly government," it eagerly embraced respondents' press freedom claims, thereby refusing to allow its inquiry to advance beyond the fervid rhetoric of prior restraint into a more discriminatory factual analysis.

More important, the appeals court clearly erred in holding that a "transparently invalid" court order affecting speech may be willfully ignored by a party subject to that court's jurisdiction. In further suggesting that

this newly-minted rule would not "lead to widespread disregard of court orders," the First Circuit panel was not merely blinking at applicable precedent but at reality.

First, this Court and others have repeatedly stressed that so long as a federal court has jurisdiction over the parties and the subject matter of the controversy its orders *must* be obeyed until modified or vacated by that court or on appeal. *Walker v. City of Birmingham*, 388 U.S. 307, 319-21 (1967); *United States v. United Mine Workers*, 330 U.S. 258, 290-983 (1947); *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911); *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973); *American Federction of Musicians v. Stein*, 213 F.2d 679 (6th Cir.), *cert. denied*, 348 U.S. 873 (1954). This is longstanding, black letter law which in itself mandates reversal of the First Circuit's holding.

Further, the First Circuit's departure from existing precedent will inevitably produce judicial chaos. The whole purpose of the requirement that a party subject to a court order must abide by its terms or face contempt is to ensure that the judicial power is not usurped by private litigants to a dispute. Yet precisely such an undesired result must occur if each party is to be left free to determine when a court has jurisdiction over it, when it "arguably" has avenues of appellate relief available to it, and when a court order in question restraining it from certain actions is "transparently invalid." Importing such loosely worded, subjective standards into the judicial process encourages each party to "be judge in his own case." It is simply naive for the First Circuit to assert otherwise.

This is not to say that all court orders are sacrosanct. Clearly an order entered by a court without proper juris-

diction over the parties or the subject matter is not entitled to deference. However:

> Only when a court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities, may an order issued by a court be disobeyed and treated as though it were a letter to a newspaper.

United States v. United Mine Workers, at 309-310 (Frankfurter, J., concurring).

In the case at hand, the trial court clearly was not "traveling outside its orbit"—a fact even the First Circuit recognized in stating that the issues propounded on appeal "admitted of no easy solution." *In The Matter Of Application To Adjudge The Providence Journal In Contempt*, 820 F.2d at 1345. It was wrong for the Journal to take the law into its own hands. Its punishment for criminal contempt must therefore be reinstated.

CONCLUSION

Nothing in the First Amendment bars a federal court from holding a newspaper in criminal contempt for willfully disobeying a temporary restraining order. The deliberate refusal to obey an order of a court without first testing its validity through established processes directly undermines the judiciary's ability to adjudge legal disputes fairly and in a responsible manner.

In the instant case, the Journal acted at its peril in deliberately choosing to publish in the face of a lawfully issued court order forbidding it to do so. The Journal's conduct displayed a total lack of respect for the judicial process and is not mitigated by any press freedoms it may enjoy. As valuable as those freedoms are:

> The most prized liberties themselves presuppose an independent judiciary through which these liberties may be vindicated. When . . . an appeal is made to the law, the issue must be left to the judgment of

courts and not the personal judgment of one of the parties. This principle is a postulate of our democracy.

United States v. United Mine Workers, 330 U.S. at 311 (Frankfurter, J., concurring).

The First Circuit's decision should be reversed and the criminal contempt sentences imposed by the district court should be reinstated.

Respectfully submitted,

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November 19, 1987

No. 87-65

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,

Petitioner,

—v.—

PROVIDENCE JOURNAL COMPANY and
CHARLES M. HAUSER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AMERICAN SOCIETY OF NEWSPAPER EDITORS, CAPITAL CITIES/ABC, INC., CBS INC., NATIONAL BROADCASTING COMPANY, INC., THE NEW YORK TIMES COMPANY, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE WASHINGTON POST AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The American Newspaper Publishers Association, American Society of Newspaper Editors, Capital Cities/ABC, Inc., CBS Inc., National Broadcasting Company, Inc., The New York Times Company, the Reporters Committee for Freedom of the Press and The Washington Post ("Amici") move, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, for leave to file a brief *amici curiae* in support of respondents. The written consents of Petitioner and Respondents have been filed with the Court.

Amici are each major broadcasting and publishing companies or associations of such companies. The American Newspaper Publishers Association is a national organization representing approximately 1,385 newspapers throughout the United States. Its membership constitutes approximately 90% of the total daily and Sunday newspaper circulation and a substantial portion of the weekly newspaper circulation in the United States. The American Society of Newspaper Editors is a

nationwide, professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States. Capital Cities/ABC, Inc. through subsidiaries owns and operates national television and radio networks, television and radio broadcast stations, and publishes newspapers and magazines, all of which are engaged in the gathering and dissemination of news. CBS Inc. operates radio and television networks, and is the owner of television and radio stations located in major cities throughout the United States. Through the CBS News division, CBS is engaged in the world-wide gathering of news and offers news programs to affiliated stations of its radio and television networks.

The National Broadcasting Company, Inc. owns and operates a national television network, and itself and through subsidiaries operates television and radio broadcast stations, all of which are engaged in the gathering and dissemination of news. The New York Times Company publishes The New York Times, a daily newspaper with a nationwide circulation, and thirty-five regional newspapers. The New York Times Company also publishes five magazines and owns five television stations, one cable television system and two radio stations. The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working news reporters and editors dedicated to protecting the First Amendment and freedom of information interests of the news media and the public. The Washington Post publishes a daily newspaper of general circulation in the Washington, D.C. metropolitan area.

This appeal raises important issues of law under the First Amendment with respect to the circumstances under which a newspaper may be enjoined from publishing newsworthy information, and the sanctions that may be imposed against a newspaper that violates such an injunction. These issues are of great significance to Amici. Amici operate under deadline pressures and must publish or broadcast news in a timely fashion. Each would suffer irreparable harm and disruption if

its publishing or broadcast activities, or the publishing or broadcast activities of its members, were enjoined, even temporarily. Accordingly, Amici have a vital interest in protecting the First Amendment right of the press freely to publish and broadcast newsworthy information and can present to the Court a valuable perspective on the issues raised in this case.

Dated: New York, New York
December 21, 1987

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Interests of Amici Curiae

A motion for leave to file this brief is being submitted today on behalf of The American Newspaper Publishers Association, American Society of Newspaper Editors, Capital Cities/ABC, Inc., CBS Inc., National Broadcasting Company, Inc., The New York Times Company, the Reporters Committee for Freedom of the Press and The Washington Post ("Amici") with the written consent of the parties pursuant to Rule 36 of

the Rules of this Court. The interests of Amici are set forth in this motion, which is bound with the brief pursuant to Rule 36. Amici have each appeared as *amicus curiae* before this Court and before other courts in cases raising issues under the First Amendment of the United States Constitution.

Statement of the Case

On November 8, 1985, Raymond Patriarca ("Patriarca") commenced the proceedings giving rise to this appeal by filing a Summons and Complaint with the United States District Court for the District of Rhode Island. The Complaint alleged in relevant part that the FBI had improperly disclosed to the Providence Journal (the "Journal"), pursuant to a Freedom of Information Act request, materials obtained as a result of illegal electronic surveillance. Simultaneously with the Summons and Complaint, Patriarca filed a motion seeking to enjoin the release of additional such materials by the FBI and to enjoin the Journal from disclosing the materials it had already received.

On November 13, 1985, the district court held a conference on Patriarca's motion, and issued a temporary restraining order, over the Journal's objections that such an order would be an unconstitutional prior restraint. The order enjoined the Journal from publishing any article with information it was alleged to have improperly received from the FBI. A hearing on the motion was scheduled for November 15, 1985.

The Journal on November 14 published an article that included information covered by the restraining order. In an accompanying article the Journal explained its view that the restraining order was an unconstitutional prior restraint.

On November 14, Patriarca filed a motion to hold the Journal in contempt, but thereafter declined to prosecute, and the district court appointed a Special Prosecutor. In the interim, on November 19, the district court vacated the restraining order and denied preliminary injunctive relief.

After the submission of stipulated facts by the Journal and Special Prosecutor, the district court entered judgment finding The Providence Journal Company and its Executive Editor, Charles M. Hauser ("Hauser"), guilty of criminal contempt. On April 2, 1986, after an additional hearing, the district court fined The Providence Journal Company $100,000, imposed a sentence of 18 months imprisonment—which was later vacated—on Hauser, and ordered Hauser to perform 200 hours of community service. The Providence Journal Company and Hauser filed a timely appeal from the district court's judgment and order.

The United States Court of Appeals for the First Circuit reversed the contempt order on December 1, 1986. The court, in an opinion by Judge Wisdom, held that under the limited exception to the collateral bar rule for "transparently invalid" orders, the Journal's violation of the district court's unconstitutional prior restraint was justified. On rehearing en banc, the court affirmed the panel's reversal of the contempt order, but added that in the future, publishers subject to prior restraints should seek emergency relief from a higher court if time permits.

Summary of Argument

This appeal requires the Court to reconcile the competing concerns of the First Amendment's prohibition against prior restraints and the collateral bar rule, which ordinarily requires adherence to court orders. Amici believe that the court of appeals reached the appropriate balance with respect to these issues. The court's opinion both protects the First Amendment right of the press to be free from unconstitutional prior restraints and reaffirms the supremacy of judicial orders over individual action. It narrowly limits the circumstances in which a newspaper or broadcaster may violate a prior restraint and raise as a defense in a subsequent contempt proceeding the unconstitutionality of that order.

In general, Amici agree with the court of appeals' statement encouraging publishers confronted with prior restraints to make a good faith effort to seek appellate review before violating those orders. As a practical matter, the harsh penalties for contempt and the risks inherent in asserting that a court order is transparently invalid assure that news publishers will not lightly decide to violate a prior restraint without first seeking appellate review. Amici also believe a blanket rule requiring publishers subject to prior restraints to exhaust their appellate remedies in all circumstances before publishing newsworthy information would be inappropriate. The importance to the public of certain news stories, for example, might be irreparably compromised by even a short delay in publication. Moreover, some newspapers and broadcasters may lack the legal resources to seek emergency appellate review on short notice. In such circumstances, a blanket rule requiring an exhaustion of appellate remedies would frustrate the First Amendment's prohibition against prior restraints and irreparably harm the free flow of information to the public that the First Amendment is designed to promote.

Argument

The Court of Appeals Correctly Held that the District Court's Restraining Order was Transparently Invalid and Could be Disregarded.

A. Transparently Invalid Injunctions may be Disregarded and Challenged in a Contempt Proceeding.

As a general rule a party must obey injunctions, and, if it believes that an injunction is improper or unwarranted, use the appellate process to challenge the disputed order. This Court has suggested, however, that under certain limited circumstances, a party may disregard an injunction and raise its invalidity as a defense in a subsequent contempt proceeding. Since the temporary restraining order issued by the district court fell within this narrow class of cases, the court of appeals

correctly held that the Journal was justified in refusing to follow that order.

In *Walker v. Birmingham*, 388 U.S. 307, 315 (1967), this Court indicated that under some circumstances a party may disregard a "transparently invalid" injunction. *Walker* involved a contempt judgment entered against the leaders of a civil rights organization who conducted a demonstration in violation of an injunction that was later held to be unconstitutional. Noting "the strong interest of local governments in regulating the use of their streets and other public places" through time, place and manner restrictions, the Court held that under the circumstances of that case, there was no reason to depart from the general rule requiring adherence to injunctions. *Id.* The *Walker* decision emphasized, however, that the case was not one "where the injunction was transparently invalid or had only a frivolous pretense to validity . . . ." *Id.* As the court of appeals in this case noted, "[t]he unmistakable import of this language is that a transparently invalid order cannot form the basis for a contempt citation." 820 F.2d at 1347.[1] Subsequent decisions have applied this narrow exception to the collateral bar rule for transparently invalid injunctions. For example, in *United States v. Dickinson*, 465 F.2d 496, 509 (5th Cir. 1972), the court held that the collateral bar rule applied to a district court gag order absent a showing of "transparent invalidity". *See also United States v. DiMauro*, 441 F.2d 428, 436 (8th Cir. 1971).

Prior restraints are a unique form of order that fit within the limited exception for transparently invalid orders.[2] Such orders

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1 This Court has also recognized other exceptions to the collateral bar rule. For example, *United States v. Ryan*, 402 U.S. 530 (1970), held that the invalidity of an order denying a motion to quash a grand jury subpoena could be asserted as a defense in a contempt proceeding. *See also Cobbledick v. United States*, 309 U.S. 323 (1940).

2 The temporary restraining order issued by the district court was a classic prior restraint—the injunction was issued before publication and prohibited conduct protected under the First Amendment. *See Near v. Minnesota*, 283 U.S. 697 (1931).

are completely antithetical to the rights guaranteed by the First Amendment, and, accordingly, have been deemed "presumptively unconstitutional" by this Court. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 558 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 396 (1973) (Burger, C.J. dissenting)). "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *see also Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Prior restraints can be justified only under the most compelling circumstances, and even then only where there are no other alternatives available. *See Fantasy Book Shop, Inc. v. Boston*, 652 F.2d 1115, 1120 (1st Cir. 1981) (prior restraint is only justifiable where, in addition to promoting an important state interest, it is the least restrictive alternative available).

In addition, this Court has held that the "loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). This irreparable harm, together with the presumptive unconstitutionality of prior restraints, indicates that such orders are encompassed within the limited exception to the collateral bar rule. Ordinarily a party subject to an unconstitutional order—even a transparently invalid order—can obtain complete relief by challenging the order on appeal. If a publisher follows a prior restraint, however, complete relief is not possible even if the order is reversed on appeal, because the interim delay in publication itself constitutes irreparable injury. Accordingly, prior restraints are among the narrow class of orders that may be disregarded and challenged in a subsequent contempt proceeding.

This Court's decision in *Thomas v. Collins*, 323 U.S. 516 (1945), although decided before *Walker*, indicates that prior restraints on speech are among the narrow class of orders the validity of which may be challenged in a contempt proceeding. In *Thomas*, a temporary restraining order that prohibited a union organizer from soliciting union memberships was viewed

as an unconstitutional prior restraint, and the defendant, who subsequently violated that order, successfully challenged its validity when he was prosecuted for contempt. *See In re Halkin*, 598 F.2d 176, 184 n.15 (D.C. Cir. 1979); *Glen v. Hongisto*, 438 F. Supp. 10, 13-14 (N.D. Cal. 1977).

State court decisions also demonstrate that prior restraints of pure speech may be challenged as transparently invalid in a contempt proceeding. In *State ex rel. Superior Court v. Sperry*, 79 Wash. 2d 69, 483 P.2d 608 (1971), *cert. denied*, 404 U.S. 939 (1971), for example, the Washington Supreme Court held that two journalists were justified in violating a gag order because the order was patently invalid under the First Amendment. Similarly, in *Wood v. Goodson*, 253 Ark. 196, 485 S.W.2d 213, 217 (1972), the Arkansas Supreme Court reversed judgments of contempt entered against a newspaper and its executive editor based upon their violation of an unconstitutional restraining order. *See also In re Berry*, 68 Cal. 2d 137, 436 P.2d 273, 281 (1968); *Cooper v. Rockford Newspapers, Inc.*, 50 Ill. App. 3d 250, 365 N.E.2d 746, 751 (2d Dist. 1977). These decisions emphasize that unlike restraining orders that primarily prohibit conduct—such as the injunction in *Walker v. Birmingham*, where the impairment of First Amendment rights had to be balanced against the state's legitimate interest in regulating the use of public property—prior injunctions against pure speech can virtually never be justified, and accordingly, are almost always transparently invalid. *See, e.g., Cooper v. Rockford Newspapers, Inc.*, 365 N.E.2d at 751.

B. The Restraining Order was Transparently Invalid.

The district court's order was presumptively unconstitutional as a prior restraint, and since the order was issued without any legitimate justification to rebut that presumption, it was a transparently invalid order that could be disobeyed.

The precise circumstances under which prior restraints may be justified remain unclear, because every direct prior restraint on pure speech that has been reviewed by this Court has been

declared unconstitutional. Indeed, this Court has indicated that a prior restraint might be justified only under the most extreme circumstances, such as an announcement of the sailing time and route of a troop ship, already at sea, during a time of war, *Near v. Minnesota*, 283 U.S. at 716, or the disclosure of other information that would "surely result in direct, immediate, and irreparable damage to our Nation or its people." *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J. concurring). Of course, the circumstances of the present case do not begin to approach the extreme exigencies of the hypothetical situation described in *Near*, or satisfy the standard enunciated by Justice Stewart. Accordingly, there was no basis for the district court's order.[3]

It was patently clear from Patriarca's complaint that he could not sustain his burden of proving that the restraint was justified under the circumstances. *See New York Times Co. v. United States*, 403 U.S. at 714; *id.* at 726-27 (Brennan, J. concurring) (proponent must allege and prove "that publication must inevitably, directly, and immediately cause" the event that justified the restraint); *see also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *Organization for a Better Austin v. Keefe*, 402 U.S. at 419. Indeed, this Court has already held that the rationale asserted by Patriarca—that disclosure of the information covered by the court's order could prove embarrassing or infringe upon his privacy rights—is an insufficient basis for a prior restraint. *Organization for a Better Austin v. Keefe*, 402 U.S. at 419-20.[4] Rather than

3 The district court's failure to find that a prior restraint would be effective or that no less extreme measures were available further demonstrates that the court's order was transparantly invalid. *See Nebraska Press Association v. Stuart*, 427 U.S. at 562-68.

4 Although Petitioner argues that the purported impairment of Patriarca's privacy rights justified the prior restraint, it ignores this Court's decision in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), which held that such an infringement of privacy rights cannot justify a prior restraint. A prior restraint is facially unconstitutional unless it "fit[s] within one of the narrowly defined exceptions to the prohibition against prior restraints," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975), and *Keefe* precludes any reliance on Patriarca's privacy rights to justify the restraining order.

attempting to restrain the offending publication, Patriarca's remedy was limited to a subsequent action for damages—an alternative he did not pursue. *See Near v. Minnesota*, 283 U.S. at 720; *Goldblum v. National Broadcasting Corp.*, 584 F.2d 904, 907 (9th Cir. 1978). Moreover, Patriarca's vague and unsubstantiated assertions of potential harm are insufficient. *See New York Times Co. v. United States*, 403 U.S. at 714; *see also id.* at 725-26 (Brennan, J. concurring) ("the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result").

Because of its unrebutted presumptive invalidity the restraining order was transparently invalid. As a prior restraint, the order would also have irreparably harmed the Journal. The court of appeals therefore correctly determined that the order could be disregarded by the Journal.

C. The Reasons Advanced by Petitioner in Support of the District Court's Order are Inadequate.

Petitioner seeks to minimize the heavy presumption of unconstitutionality that accompanies prior restraints to bolster its assertion that the district court's order was not transparently invalid. Petitioner's brief at 35-43. The authorities relied on by Petitioner, however, do not support its position. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), and *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), both concern the inherent power of a court to regulate the conduct of parties and prevent abusive conduct in cases before it. *Seattle Times Co.*, for example, involved a discovery order, and the Court emphasized that the disputed order "both granted [the newspaper] access to that information and placed restraints on the way in which the information might be used." 467 U.S. at 32. *Gulf Oil Co.*

concerned an order regulating the conduct of class counsel and class representatives. Neither decision, however, provides any support for the issuance of an injunction against the disclosure by a news publisher of information independently obtained by that publisher.

Petitioner also relies on *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), but fails to note that it involved a post-publication action for damages, and not a prior restraint. An injunction was issued in *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), *cert. denied*, 108 S. Ct. 213 (1987), but the materials at issue were copyrighted, and this Court has indicated that because of the Copyright Clause of the Constitution, copyrighted works may be subject to different treatment under the First Amendment. *See New York Times Co. v. United States*, 403 U.S. at 731 n.1 (White, J., concurring). *National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575 (1969), on which Petitioner also relies, is distinguishable because the speech at issue there constituted a threat of retaliatory discharge proscribed by the National Labor Relations Act, and was therefore an unfair labor practice unprotected by the First Amendment.[5] *See New York Times Co. v. United States*, 403 U.S. at 731 n.1 (White, J., concurring) (distinction under First Amendment between NLRB injunctions against private parties and injunctions against publication by press). Finally, Petitioner's reliance on *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1975), and *National Commission on Egg Nutrition v. Federal Trade Commission*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978), is misplaced, because those cases concern commercial speech, which this Court has held may be subject to different restrictions than the pure speech that the district court enjoined. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985).

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5 Substantively illegal conduct, of course, is not immunized by the First Amendment merely because it is accomplished in whole or in part through speech.

In its brief, Petitioner also relies on a purported conflict between the Fourth Amendment and the First Amendment to justify the restraining order. However, as the court of appeals correctly held, the Fourth Amendment is not even implicated in this case because the Fourth Amendment does not apply to private parties. "This Court has . . . consistently construed this protection as proscribing only governmental action . . . ." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *see also United States v. Calandra*, 414 U.S. 338, 354 (1974) ("purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects."). There is no conflict between the First and the Fourth Amendments, because the Fourth Amendment does not apply to a private party such as the Journal and did not prevent it from publishing the material about Patriarca.

Petitioner also relies on the flawed premise that the restraining order was justified as an interim measure to preserve the "status quo" until the district court could review the materials in question and make a determination concerning the harm that might result from their disclosure. Allowing a party to obtain a prior restraint to preserve the "status quo" is wholly unjustified because it would undermine the presumption of unconstitutionality that accompanies prior restraints. *See Nebraska Press Association v. Stuart*, 427 U.S. at 558. This is particularly true where—as in the present case—the party seeking the restraint has no colorable basis for such an order.

Moreover, the very characterization of a restraining order against the publication of news as preserving the status quo is misleading, because the news is a dynamic and constantly changing commodity.[6] Restraining publication under such cir-

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6 Petitioner's additional argument that the prior restraint was justifiable because of its short duration, is equally wrong and misconstrues the protections embodied in the First Amendment. This Court has held that the length of time for which a prior restraint is in effect is not relevant to its constitutionality, because every prior restraint has an "immediate and irreversible" impact and constitutes irreparable injury.

(*footnote continued*)

cumstances only serves the unconstitutional purpose of halting the dissemination of protected speech. This principle is particularly true with respect to prior restraints directed at the news media, since news which is not published or broadcast immediately frequently loses its significance to the public. For example, news articles concerning incipient events such as an election, the confirmation of a public official or a legislative vote may become completely moot if publication is delayed for even a brief period of time. Yet, in any of these situations an individual could seek to enjoin or delay publication of an embarrassing article relying on allegations—such as those raised by Patriarca—that his privacy has been invaded. A rule that precluded raising the unconstitutionality of a prior restraint as a defense in a subsequent contempt proceeding would undermine the presumed unconstitutionality of restraining orders, and as a practical matter constitutes the enforcement of prior restraints and gives rise to the "irreparable injury" to First Amendment rights condemned in *Elrod*.

There have been circumstances in which newspapers and broadcasters have delayed publication and sought review of restraining orders. This Court, however, should not impose a blanket rule requiring adherence in all circumstances to transparently invalid prior restraints pending appellate review. *See Goldblum v. National Broadcasting Corp.*, 584 F.2d at 907 ("A broadcaster or publisher should not . . . be required to make a sudden appearance in court and then to take urgent measures to secure appellate relief, all the while weighing the delicate question of whether or not refusal to comply with an apparently invalid order constitutes a contempt."). News publishers will not lightly decide to disregard a prior restraint, because in doing so they must assume the risk that a reviewing court will

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Elrod v. Burns, 427 U.S. at 373; *see New York Times Co. v. United States*, 403 U.S. 713 (1971); *Nebraska Press Association v. Stuart*, 427 U.S. at 559 ("the burden on the [party seeking the restraint] is not reduced by the temporary nature of a restraint.").

disagree with their judgment that the order was transparently invalid. The threat of contempt, and the unavailability under *Walker* of a good faith defense, assures that in all but the most egregious cases publishers will not violate prior restraints.[7] Moreover, in many cases the limited legal resources available to a newspaper or broadcaster on short notice may foreclose the possibility of an immediate, emergency appeal. In such situations, a rule conditioning the *Walker* exception on the exhaustion of appellate remedies would, as a practical matter, require adherence to prior restraints.

A blanket rule requiring adherence to prior restraints pending appellate review is also inappropriate because in many cases the significance to the public of news stories will be irretrievably lost if they are not published immediately.[8] For example, articles concerning pending legislation or the subject of a confirmation hearing may have significance to the public only if they are published immediately.

There was no basis for issuing a prior restraint in this case. The reasons advanced in support of the order were legally

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7 The threat of contempt is in addition to any possible threat of liability for publishing in violation of the legal rights of the party seeking the prior restraint.

8 For this reason, even if some attempt to seek appellate review were generally held to be a prerequisite to challenging the validity of a prior restraint in a contempt proceeding, no more than a good faith effort to obtain emergency relief prior to publication should be required. Indeed, the *en banc* court in the instant case, suggesting that publishers generally seek emergency relief from unconstitutional prior restraints, explicitly noted "[i]f timely access to the appellate court is not available or if timely decision is not forthcoming, the publisher may then proceed to publish and challenge the constitutionality of the order in the contempt proceeding." 820 F.2d at 1355 (footnote omitted). Similarly, this Court suggested in *Walker* that the collateral bar rule might not apply where a party faced with an unconstitutional prior restraint met with "delay and frustration" in seeking judicially to vindicate its First Amendment rights. 388 U.S. at 318.

inadequate, and accordingly, the presumption of unconstitutionality was not overcome. Moreover, adherence to the prior restraint would have constituted irreparable harm. Under these circumstances, the court of appeals correctly held that the order was transparently invalid and could be challenged in the contempt proceeding.

Conclusion

For the foregoing reasons, the order of the court of appeals should be affirmed.

Dated: New York, New York
December 21, 1987

Respectfully submitted,

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No. 87-65.

In the
Supreme Court of the United States.

OCTOBER TERM, 1987.

UNITED STATES OF AMERICA,
PETITIONER,

v.

PROVIDENCE JOURNAL COMPANY AND
CHARLES M. HAUSER,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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QUESTION PRESENTED.

Whether the First Circuit correctly refused to extend the collateral bar rule to a transparently invalid prior restraint of pure speech, and allowed a newspaper and its editor to raise the obvious unconstitutionality of a gag order as a defense in a contempt proceeding commenced against them?

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No. 87-65
In the Supreme Court of the United States
October Term, 1987

United States of America,
Petitioner,
v.
Providence Journal Company and
Charles M. Hauser,
Respondents

On Writ of Certiorari To the United States Court of Appeals for the First Circuit

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Brief Amicus Curiae of the American Civil Liberties Union, the Civil Liberties Union of Massachusetts, and the Rhode Island Civil Liberties Union

INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide nonpartisan organization dedicated to defending the freedoms embodied in the Bill of Rights. The Civil Liberties Union of Massachusetts and the Rhode Island Civil Liberties Union are its statewide affiliates.

Throughout its 65-year history, the ACLU has been particularly concerned about

the corrosive effect of prior restraints in a democratic society. The ACLU and its affiliates have therefore been involved in numerous cases, both in this Court and lower courts, addressing the constitutionality of prior restraints.

This case involves a transparently invalid prior restraint imposed on a newspaper. Respondent disregarded that order and was held in contempt. If that contempt order is now affirmed by this Court, a new and significant exception will have been created to the substantive rules against prior restraint. Amici urge this Court to reject that result, and submit this brief in support of the respondents to express our fundamental organizational concerns.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case

set forth by the respondents.

SUMMARY OF ARGUMENT

In Walker v. City of Birmingham, 388 U.S. 307 (1967), this Court approved the State of Alabama's "collateral bar" rule, which prohibited a litigant from asserting a constitutional defense to a contempt of court charge arising from the violation of a judicial order. In so doing, the Court permitted an exception, under the special circumstances of Walker, to the time-honored process by which citizens may challenge unlawful exercises of governmental authority by disobeying that authority and then defending their actions in subsequent criminal proceedings. This Court emphasized in Walker that its ruling did not apply to pure speech and also specifically exempted judicial orders that are "transparently invalid" or have "only a

frivolous pretense to validity." 388 U.S. at 315.

The Court of Appeals for the First Circuit properly applied this language in Walker by permitting a challenge to the constitutionality of a gag order in this case. Not only was the district court's order transparently invalid, but it also was a prior restraint of pure speech -- the most highly suspect of all First Amendment infringements, and the one most inimical to democratic government. Nothing in Walker or any other decision of this Court requires mandatory compliance with a prior restraint except in the most extraordinary situations. The facts in this case fall far short of meeting this well-established test.

Nor does this case present a compelling argument for extending Walker. Respect for law only decreases if courts

can punish the exercise of fundamental rights through unreviewable criminal contempt penalties. Conversely, permitting parties to defend their disobedience on the merits preserves respect for the judicial process. Courts regularly adjudicate the validity of nonappealable judicial orders in the context of contempt without noticeable diminution in respect for the judiciary.

The First Circuit's refusal to extend the collateral bar rule to a circumstance in which a litigant declined to obey a patently invalid gag order fully comports with this Court's precedents. The constitutional stakes are especially high in a prior restraint context. If a prior restraint can only be challenged on appeal, as petitioners argue, then the decision regarding what and when to publish will have passed from editors to judges.

Nothing in this case justifies such a dramatic departure from basic First Amendment principles.

ARGUMENT

I. THIS COURT'S DECISION IN WALKER V. CITY OF BIRMINGHAM DOES NOT PRECLUDE DEFENDANTS IN CONTEMPT PROCEEDINGS FROM ASSERTING THAT THE ORDER THEY VIOLATED WAS A TRANSPARENTLY INVALID PRIOR RESTRAINT OF PURE SPEECH.

Under this Court's decision in Walker v. City of Birmingham, 388 U.S. 307 (1967), the collateral bar rule does not apply to judicial orders that are transparently invalid, or that restrain pure speech. The publication of a news story by the Providence Journal, in violation of a plainly unconstitutional gag order, falls squarely within both of these exceptions. Thus, the Journal should not be precluded from challenging the validity of the

temporary restraining order in defense to the charge of contempt. Any other result, as the Court of Appeals concluded, would involve an unacceptable sacrifice of First Amendment freedoms. A reasonable, good faith effort to pursue judicial relief within the time constraints of a daily newspaper's publication deadline is the most that may be required, as the Court of Appeal's en banc opinion held.

(A) The Collateral Bar Rule Does Not Apply to Transparently Invalid Orders.

This Court's 5-4 decision in Walker upheld a state law exception to the general rule that arguably invalid judicial orders, like statutes and legislative orders, may be disobeyed at the litigant's risk and then challenged on the merits as a defense to charges of contempt. See, e.g., Maness v. Meyers, 419 U.S. 449 (1975); United

States v. Ryan, 402 U.S. 530 (1971); Branzburg v. Hayes, 408 U.S. 665 (1972); Thomas v. Collins, 323 U.S. 516 (1945); United States v. Cobbledick, 309 U.S. 323 (1940).

The collateral bar rule is a departure from the usual proposition that the government cannot compel obedience to illegal orders. As a general rule, an individual in our system of government may disobey legislative, executive, or administrative directives and then argue as a defense in subsequent enforcement proceedings that the underlying prohibition was invalid. For example, defiance of an unlawful police order cannot be the basis for a criminal conviction. Wright v. Georgia, 373 U.S. 284 (1963). Similarly, an individual charged with violating a statute or ordinance may defend on the basis of the statute's illegality.

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Hague v. CIO, 307 U.S. 496 (1939). Disagreement with an administrative regulation may require exhaustion of remedies, but this Court has approved collateral attack, after disobedience, "where there appears no significant interest to be served in having the [agency] decide the issue before it reaches the courts." McKart v. United States, 395 U.S. 185, 200 (1969). Even the subpoena power of Congress may be challenged in contempt proceedings. Barenblatt v. United States, 360 U.S. 109, reh'g denied, 361 U.S. 854 (1959). Finally, judicial orders that are interlocutory in nature may be challenged by disobedience and subsequent defense to contempt charges, e.g., United States v. Cobbledick, 309 U.S. 323 (1940), while judicial orders entered by courts that lack

jurisdiction are void, and may also be disregarded. United States v. United Mine Workers of America, 330 U.S. 258, 290-93 (1947); In re Sawyer, 124 U.S. 200, 220-22 (1888); Note, "Defiance of Unlawful Authority," 83 Harv. L. Rev. 626, 633-34 (1970).

This Court's decision in Walker approved Alabama's rule precluding Martin Luther King, Jr. and his fellow protestors from collaterally attacking a contempt citation issued for disobeying a judicial injunction against a public march. Walker, however, is a narrow decision. The majority in Walker carefully distinguished orders that are transparently invalid, or have "only a frivolous pretense to validity." 388 U.S. at 315. The majority specifically excluded from its decision restraints on pure speech unaccompanied by conduct which state and local governments

have a strong interest in regulating. Id. at 315. Moreover, the Court in Walker expressed doubt that its decision could have consequences much beyond "the circumstances of this case." Id.

In the twenty years since, numerous authorities have concluded that Walker does not apply to "transparently invalid" gag orders. See, e.g., 3 C. Wright, Federal Practice and Procedure § 702, at 815 n.17 (1982); Ex Parte Purvis, 382 So.2d 512, 514 (Ala. 1980); State ex. rel. Superior Court of Snohomish County v. Sperry, 79 Wn.2d 69, 74, 483 P.2d 608, 611, cert. denied, 404 U.S. 939 (1971); In re Berry, 68 Cal.2d 137, 150, 436 P.2d 273, 282, 65 Cal. Rptr. 273, 282 (1968). See also United States v. Roundtree, 420 F.2d 845, 853 (5th Cir. 1969)(refusing to enforce conviction arising from disobedience of court order to respond to Internal Revenue Service

summons); Glen v. Hongisto, 438 F.Supp. 10, 14-18 (N.D.Cal. 1977)(permitting defense on the merits to violation of injunction restricting both pure speech and picketing); Johnson v. Preston, 12 Ohio St.2d 100, 233 N.E.2d 132 (1967)(failure to seek modification of injunction does not preclude defense on the merits on basis of a change in the law); Wojahn v. Halter, 229 Minn. 374, 382, 39 N.W.2d 545, 549 (1949)(permitting collateral habeas challenge to imprisonment for violation of court order requiring payment of money; "[i]f . . . failure to obey a court's order requiring a debtor to pay an ordinary debt could be made the basis for a sentence of imprisonment on the ground that the debtor was guilty of contempt, little would remain of our constitutional protection against

imprisonment for debt").[1]

The "transparently invalid" rule clearly applies here. The Providence Journal faced a prior restraint of a newspaper article -- the most strongly disfavored interference with First Amendment freedoms. As the Court of Appeals decision demonstrates, the gag order rested on patently faulty conceptions

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1. Although the Court of Appeals for the Fifth Circuit held in United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972), that the violation of some invalid orders may justify contempt citations, the court also specifically acknowledged that transparently invalid orders could not compel such obedience. Id. at 509. Furthermore, the Court noted: "[g]iven [the] flexibility in contempt cases, an erroneous view regarding the lawfulness of the underlying order may well taint the judgment of contempt." Id. at 513. The Court supported this observation by citing Donovan v. City of Dallas, 377 U.S. 408 (1964)); and Dunn v. United States, 388 F.2d 511 (10th Cir. 1968), cases in which contempt judgments were vacated and remanded to determine whether a penalty should still be imposed once the order was ruled invalid on the merits.

of the Fourth Amendment, the Freedom of Information Act, 5 U.S.C. § 552 (1982 & Supp. III 1985), and the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-21 (1982 & Supp. III 1985).[2] In re Providence Journal, 820 F.2d

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2. This Court has rejected restraints on speech in much more compelling circumstances than those presented here, such as the risk to a fair trial posed in Nebraska Press v. Stuart, 427 U.S. 539 (1976), or the claimed threat to national security and foreign policy in the Pentagon Papers case, New York Times v. United States, 403 U.S. 713 (1971). The Providence Journal's story presented neither a danger to Sixth Amendment rights nor an issue of national security. The story presented none of the exceptional circumstances that existed in Snepp v. United States, 444 U.S. 507 (1980), where a former employee of the Central Intelligence Agency was held to have waived his First Amendment rights by agreeing to submit his writings to prior CIA review; or Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), where access to private information through the civil discovery process was held not to justify dissemination of that information in advance of trial. The gag order in the present case, purportedly entered to protect privacy, was squarely and transparently unconstitutional under this

1342, 1349-51 (1st Cir. 1986). Because the order was "transparently invalid" within the meaning of Walker, the newspaper was entitled to disregard it.

(B) The Collateral Bar Rule Does Not Apply to Prior Restraints of Pure Speech.

The Providence Journal was held in contempt for publishing a newspaper story. Walker v. Birmingham hardly compels that result. Justice Stewart's opinion for the Court in Walker carefully distinguished between pure speech and speech connected to conduct. 388 U.S. at 316, quoting Cox v. Louisiana, 379 U.S. 536, 555 (1965).

The district court's order underlying the contempt charge here is an example of "the most serious and least tolerable

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Court's decisions in Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977), and Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

infringement on First Amendment rights," Nebraska Press Association v. Stuart, 427 U.S. 539, 559 (1976), and the generalized judicial interest in securing obedience to its orders cannot overcome the constitutional presumption against such restraints on pure speech. See New York Times v. United States, 403 U.S. 713, 714 (1971).

In most cases involving pure speech, of the type published by the Providence Journal, any damage to private interests arising from the publication can be compensated after publication if, indeed, any legally cognizable injury can be shown. See Nebraska Press Association v. Stuart, supra, 427 U.S. at 571 (Powell, J., concurring). With pure speech, no concerns for preserving public safety or order can be cited, as they were in Walker, where the march proposed by Dr. Martin Luther King,

Jr. and his supporters transpired during a period of political instability and racial violence.[3] No similar factors appear here, where simple publication of a news story of general public interest is at issue.

II. WALKER V. BIRMINGHAM SHOULD NOT BE EXTENDED TO PRECLUDE AN ALLEGED CONTEMNOR FROM CHALLENGING THE CONSTITUTIONALITY OF A TRANSPARENTLY INVALID PRIOR RESTRAINT OF PURE SPEECH.

The rationales that have been offered for the collateral bar rule are not sufficient to justify its extension to transparently invalid prior restraints of pure speech. These rationales include the need: (1) to guard against possible risks to public safety; (2) to assure respect for

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3. See generally J. Williams, Eyes on the Prize (1987)(Chapter 7); J. Skolnick, The Politics of Protest: The Skolnick Report to the National Commission on the Causes and Prevention of Violence (1969); S. Carmichael & C. Hamilton, Black Power: The Politics of Liberation in America (1967).

the rule of law; and (3) to discipline individuals who seek to be judge of their own case. Walker v. City of Birmingham, supra, 388 U.S. at 320-21.

Because pure speech neither threatens public safety nor undermines respect for the rule or law, these rationales cannot foreclose the defense of transparent unconstitutionality where the litigant has engaged in pure speech. And because the prospect of post-violation punishment will adequately discipline individuals who seek to "judge their own cases," the collateral bar rule is unnecessary to preserve respect for the judiciary.

(A) No Threat to Public Safety, or Indeed, to any Public Interest, Justifies Extension of the Collateral Bar Rule to a Transparently Invalid Prior Restraint of Pure Speech.

There is no claim in this case that the contempt citation against the

Providence Journal was required to guard against an imminent threat of violent or lawless action, Brandenberg v. Ohio, 395 U.S. 44 (1969), or an immediate and serious threat to national security. See Near v. Minnesota, 283 U.S. 697, 716 (1931). Indeed, there are no facts in this record even remotely approximating the kinds of extraordinary governmental interests that this Court has historically demanded as justification for a prior restraint. See discussion, supra, note 2. See also, e.g., Organization for a Better Austin v. Keefe, 402 U.S. 415, 418-20 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1968).

In this context, any supposed risk to public interests posed by the danger that some technically appealable court orders may be disobeyed should be handled in the same way that the system handles risks arising from disobedience to interlocutory

court orders, executive directives, statutes, congressional subpoenas, or administrative orders. An individual may disobey an order, ordinance or law and raise his constitutional claims as a defense in an enforcement proceeding, complete with the full safeguards of due process, rather than in the hurried context of arguments on a temporary restraining order or an expedited appeal.

(B) Respect for Law Will be Enhanced, Not Undermined, by Permitting a Defense on the Merits.

Respect for law increases, rather than decreases, when courts are as accountable as other branches of government for their unlawful acts. When the judiciary refuses to hear collateral attacks upon its own orders, it risks the appearance, at least, of engaging in an unjustified exercise in self-protection. Such appearances

ultimately injure society's interest in fostering respect for judicial processes. Moreover, allowing collateral attack on transparently invalid orders that burden pure speech would not reduce citizen compliance with lawful -- or even arguably lawful -- decrees, for the citizen still faces a substantial risk of criminal penalties if proven wrong.

The deterrence to disobedience under this approach is the correct one in the context of the First Amendment: only those litigants who are confident of full vindication on the merits will take the risk. Those who misjudge will remain subject to the punishment of contempt.

In many situations, violating a court order and defending on grounds of the order's invalidity is the only way to challenge it. E.g., Branzburg v. Hayes, 408 U.S. 665 (1972); United States v. Ryan,

402 U.S. 530 (1971). See also Maness v. Meyers, supra, 419 U.S. 449 (permitting defense on the merits to contempt flowing from violation of court order); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975), cert. denied sub nom. Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976)(permitting First Amendment defense for violation of court rules). This approach to enforcement is obviously feasible and workable. It has not led to a breakdown in respect for the courts. The deterrence that comes from the genuine risk that the party disobeying a court order may be wrong -- and may be punished after losing on the merits -- is the appropriate, tailored solution to the tension between the judiciary's demand for respect and the First Amendment's demand for the "breathing space" that it needs "to survive." NAACP v. Button, 371 U.S. 415,

433 (1963).

The argument that litigants should not be allowed to judge their own cases -- or, as the petitioners creatively frame it, to usurp the function of Article III courts -- is really just a regurgitation of the argument that courts deserve respect. It is not readily apparent why our system of government, which allows defenses on the merits after disobedience of statutes, executive orders, congressional subpoenas, interlocutory judicial orders, and judicial orders issued by courts lacking jurisdiction over the parties or over the subject matter, cannot also survive disobedience of transparently invalid injunctions that restrain the exercise of our most fundamental and vital freedom, the freedom to speak.

Permitting litigants in contempt proceedings to raise defenses on the merits

does not allow them to judge their own cases. The only question is the timing of the judicial review. Symbolic respect for law is significant but it is not advanced by prohibiting a defense on the merits to charges that a newspaper has defied an obviously unconstitutional gag order. As the First Circuit ruled en banc, the law requires good faith efforts to pursue emergency judicial relief before publication deadlines, but where the possibility of such relief is negligible, litigants must be permitted to defend against contempt charges on the merits.[4]

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4. Here, the First Circuit found no evidence that timely emergency relief was available within the constraints of the publisher's decision-making, and ruled that it would be unfair "to subject the publisher to the very substantial sanctions imposed by the district court because of its failure to follow the procedure we have just announced." In re Providence Journal, supra, 820 F.2d at 1355. Thus, the Court of Appeals -- the judicial body with the

In short, punishing the exercise of fundamental rights through unreviewable criminal contempt penalties lessens respect for the rights themselves and for the judicial process designed to protect them. As Justice Scalia recently observed, the "inherent power" of the judiciary "must be restrained by the totality of the Constitution, lest it swallow up carefully crafted guarantees of liberty." Young v. United States ex rel. Vuitton et Fils S.A., 107 S. Ct. 2124, 2146 (1987)(concurring

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greatest knowledge of its own procedures -- found that the Journal probably could not have obtained appellate relief in the approximately eight hours between the termination of the hearing before Judge Boyle and the publication deadline. Although, under the First Circuit's ruling, a monthly or even weekly publication would probably be required to seek appellate relief, a daily newspaper which is planning to publish an article the following day probably would not. Any other result would substitute judicial time schedules for editorial judgment in deciding when a news story should be published.

opinion).[5]

(C) Extending the Collateral Bar Rule to Transparently Invalid Prior Restraints of Pure Speech Would Impose Intolerable Burdens on First Amendment Freedoms.

The freedom from sanctions for disobeying an illegal order is never more critical than in a situation where, as here, the cost of compliance would have been irretrievable loss of constitutionally protected speech. As this Court has recognized, "the loss of First Amendment

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5. Failure to impose such limits ushered in the era of the labor injunction, hardly a period of judicial activity that strengthened respect for law. See Young v. United States ex rel. Vuitton et Fils S.A., supra, 107 S.Ct. at 2145-46 (Scalia, J., concurring); A. Cox & D. Bok, Cases and Materials on Labor Law 101-107 (1962); Walker v. City of Birmingham, supra, 388 U.S. at 330 (Warren, C.J., dissenting)("[t]he labor injunction fell into disrepute largely because it was abused in precisely the same way that the injunctive power was abused in this case").

freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). For that reason, this Court has articulated a heavy burden on any governmental entity that would impose a prior restraint. Nebraska Press, supra, 427 U.S. at 557-61; Organization for a Better Austin v. Keefe, supra, 402 U.S. at 418-20; Near v. Minnesota, supra, 283 U.S. at 716. That burden should not be reduced merely because the restraint is imposed by the judicial branch.

The seemingly simple obligation of obeying a court order pending its appeal may pose serious and irreparable damage to the speech and press rights of a newspaper. Ex Parte Purvis, supra, 382 So.2d at 514. See Maness v. Meyers, supra, 419 U.S. at 460-461 (where the injury from the erroneous order is irreparable and the

constitutional right involved has ancient roots, the violation may not be punishable by contempt if the order itself was invalid); Thomas v. Collins, supra, 323 U.S. 516 (rejecting as an intolerable prior restraint a temporary restraining order against a labor organizer).

In many circumstances, publication delayed means publication denied -- because the communication is no longer timely or immediate. See, e.g., Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 182 (1968); Pennekamp v. Florida, 328 U.S. 331, 346-47 (1946); Bridges v. California, 314 U.S. 252, 268 (1941). For example, a delay in publication could give outsiders an opportunity to interfere with the news reporting function through intimidation. Halting dissemination of news could alter election results, stock market behavior, or other significant

events that depend on the actions of people who await each daily newspaper for critical information about the world. "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." Nebraska Press, supra, 427 U.S. at 559. Surely, First Amendment freedoms cannot be safeguarded if an individual trial judge can decide the importance and urgency of a given news story.

The loss of First Amendment freedoms in the face of an expanded collateral bar rule threatens the vitality of the First Amendment itself. In this case, the Providence Journal was willing to risk punishment for speech by disobeying what it correctly perceived to be an unconstitutional prior restraint; other speakers or members of the press may not be

so willing. If illegal restraints curb speech, the resulting coerced silence harms speakers, listeners, and the vitality of a free society.

It is because of the great risk of sacrificing fundamental freedoms in the heat of perceived exigencies that the First Amendment struck the balance in favor of speech, and against prior censorship. When the government cannot muster specific evidence to show that an extraordinary public interest justifies the sacrifice of a First Amendment right in the name of compliance with a judicial order, the government should not be permitted to punish pure speech on the basis of procedural rule about the timing of litigants' objections. See Note, "Defiance of Unlawful Authority," supra, 83 Harv. L. Rev. at 639-40. Without constitutional limitations, the collateral bar rule could

permit the least democratically answerable public officials to punish and chill pure expression, where a statute or ordinance identical in content would remain subject to challenge on the merits after disobedience.[6]

Our judiciary is vital enough to survive violations of gag orders that are transparently invalid or have only a frivolous pretense to validity. It would betray, not advance, the rule of law if this Court expanded Walker to prohibit a newspaper from defending itself against serious criminal penalties on the ground that its action was not only constitutionally protected but entitled to the very highest solicitude under the Bill

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6. Indeed, unlike other government officers who act unconstitutionally, a judge is ordinarily immune from any liability for damages caused by his unlawful activity. See Stump v. Sparkman, 435 U.S. 349 (1978).

of Rights.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

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